

THE CONSTITUTIONAL CHARTER OF OHIO'S ATTORNEY GENERAL

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In each American jurisdiction there is a governmental officer who bears the label, derived from the common law, of "attorney general." The lineage of the modern attorney general in the United States extends back to the similarly denominated legal officers of the American colonial period and, ultimately, to the attorney general of England, since the attorney general concept was among the elements of the English common law adopted by the colonists. With a single exception,¹ the colonial legislatures eschewed any attempts at precise delineation of the powers and duties of their attorneys general. Rather, description of a colonial attorney general's role was left to custom and common law, and the colonial law officers were typically ascribed the same functions that had devolved upon their English precursors.² At the time of the American Revolution the common law attorney general was rather broadly acknowledged as the appropriate officer to commence and pursue any legal action that might justifiably be undertaken by the sovereign.³

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¹ Only in Rhode Island was there a statute detailing the attributes of the attorney general. Key, *The Legal Work of the Federal Government*, 25 VA. L. REV. 165, 169 n.16 (1938). There was an attorney general in each of the American colonies. Kramer and Siegel, *The Attorney General of England and the Attorney General of the United States*, 1960 DUKE L.J. 524, 525.

² See Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEGAL HIST. 304, 309 (1958). The various colonial attorneys general rendered mixed performances, inspiring both acerbic criticism and high praise. See H. CUMMINGS AND C. MCFARLAND, *FEDERAL JUSTICE* 9-12 (1937). Following the attainment of independence, each of the United States except Connecticut preserved the office of attorney general. Cooley, *supra*, at 311.

³ The common-law attorney general concept evolved over several centuries, during which the attorney general of England absorbed steadily increasing power and prestige, finally becoming the "chief law officer of the crown." See J. EDWARDS, *THE LAW OFFICERS OF THE CROWN* 12-31 (1964); T. PLUCKNETT, *CONCISE HISTORY OF THE COMMON LAW* 228-30 (5th ed. 1956); R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 111-18 (1953). The attorney general had established his supremacy among English law officers by the end of the seventeenth century, and

at the time of the birth of the American Union, the experience of centuries, both in England and in the Colonies, had demonstrated the need for the centralization of the conduct of the sovereign's law business in one officer, known as an Attorney General, if the interests of the sovereign were to be adequately and efficiently served. So it was also that at that time the very title of "Attorney General" had been recognized to carry with it complete and exclusive power over all legal affairs of the Government, an authority that no one save the sovereign himself could question.

Key, *supra* note 1, at 173.

Although there exists no comprehensive enumeration of the common law powers and duties of the eighteenth century attorney general, it is nonetheless possible to cull from English writings of the period some insight regarding particular circumstances in which attorney general action was readily accepted. In addition to his consultative role as the state's legal adviser, the eighteenth century attorney general engaged in both criminal and civil litigation. With respect to criminal matters, it is at least clear that the attorney general was empowered to commence prosecutions in certain situations.⁴ In the arena of civil litigation, the common law attorney general played a dual role, both championing the proprietary and pecuniary interests of the government itself⁵ and contesting infringements of the rights of the general public via the doctrine of *parens patriae*.⁶ Thus the

⁴ For example, the attorney general could file informations with King's Bench to redress "such enormous misdemeanors as peculiarly tend to disturb or endanger [the king's] government." 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 308 (Wendell ed. 1856). Although prosecutions for mundane criminal activity were typically left in the hands of private individuals throughout much of the English history, see generally Note, *The District Attorney—A Historical Puzzle*, 1952 WIS. L. REV. 125, the attorney general seemingly possessed vast, seldom-used authority in this area. See J. EDWARDS, THE LAW OFFICERS OF THE CROWN 13-14 (1964); Van Alstyne and Roberts, *The Powers of the Attorney General in Wisconsin*, 1974 WIS. L. REV. 721, 726; Note, *Attorney General—Common Law Power over Criminal Prosecutions and Civil Litigation of the State*, 16 N.C.L. REV. 282, 284 (1938). The level of attorney general criminal prosecutorial activity was much greater in the colonies. H. CUMMINGS & C. MCFARLAND, FEDERAL JUSTICE 13 (1937).

⁵ As the representative of the crown itself, the attorney general could exploit all ordinary avenues of legal redress in order to collect revenues and to otherwise protect crown property from misappropriation or abuse. Furthermore, stemming from the medieval perception of the king as "praerogative," see Holdsworth, *The Early History of the Attorney and Solicitor General*, 13 ILL. L. REV. 602, 612 (1919), the attorney general could avail himself of exceptional litigation privileges. The attorney general was the recipient of "superior standing" in the courts. Cooley, *supra* note 2, at 305. He could, moreover, employ a variety of extraordinary writs. The attorney general could proceed by information in rem to acquire for the Crown title to seized or unclaimed chattels. See 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 262-63 (Wendell ed. 1856); J. CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN AND THE RELATIVE DUTIES AND RIGHTS OF THE SUBJECT 332-36 (1820). He could initiate an "inquest of office" to recover any type of property on behalf of the sovereign. See J. CHITTY, *supra*, at 246-61. Additionally, the attorney general might use the writ of *scire facias* to seek revocation of grants improvidently made by the Crown, *id.* at 330-31, or invoke the writ of quo warranto to challenge the usurpation or misuse of any charter or office. See 3 W. BLACKSTONE, *supra* at 263; J. CHITTY, *supra*, at 336-38.

⁶ The common-law attorney general's stewardship of the public interest, accomplished through the ancient office of the monarch as "*pater familias* of the kingdom," see 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 220 (Wendell ed. 1856), centered upon the curtailment of public nuisances and the enforcement of charities. In the absence of unusual circumstances, the existence of a common nuisance would generate no right of legal action in the hands of those individuals thereby affected. *Id.* at 219. Rather, the collective injury produced a single cognizable legal claim that only the Crown as *parens patriae* might assert. Hence it was incumbent upon the attorney general to contest activities injurious to the public. See *id.* at 220; 4 *id.* at 167. Likewise, since eleemosynary dispositions inure to the benefit of the public generally, it was the attorney general, the chief law officer of the *parens patriae*, who

incidents of attorney generalship, as evidenced by the common law and custom of eighteenth century England and the American colonies, were quite extensive.

The office of attorney general of Ohio has existed for one hundred thirty years, and except for the first five has been established as a constitutional position. However, Ohio's constitution is virtually devoid of direct explication of the functions to be undertaken by the attorney general,⁷ and Ohio's early attorneys general played a very limited role in the conduct of state government, confining their activities mainly to giving rather perfunctory legal advice and prosecuting and collecting state claims.⁸ It is the thesis of this article that Ohio's attorney general possesses a greater range of powers and duties than has usually been recognized by the men elected to that office. More specifically, it is the contention of this article that the charter of Ohio's attorney general is comprised of the fundamental characteristics of the common law attorney general concept—the status of “chief law officer” and its incidental attributes—and that these traditional qualities inhere in the office of the attorney general of Ohio by virtue of its constitutional origin. Some commentators have posited that the attorney general serves, within constraints imposed by the General Assembly, as little more than an assistant to Ohio's Governor.⁹ This view may derive superficial support from a wooden reading of Ohio's constitution and certainly accords with the actual performance of most Ohio attorneys general. It is submitted, however, that this view does not comport with a principled analysis of the office in light of Ohio constitutional history.

alone was permitted to maintain “an information in the Court of Chancery to have the charity properly established.” 3 *id.* at 427. See J. CHITTY, *supra* note 5, at 161-62. See also J. EDWARDS, *THE LAW OFFICERS OF THE CROWN* 286 (1964).

⁷ See OHIO CONST. art. III, §§ 1-21.

⁸ During the period 1846-1900, several thousand opinions were issued by Ohio's attorneys general, but the overwhelming majority of these opinions were merely very short letters of advice without citation to any legal authorities. See generally 1-4 OFFICIAL OPINIONS OF THE ATTORNEY GENERAL OF THE STATE OF OHIO (W. Ellis ed. 1905). cursory examination of the annual and biennial reports of Ohio's nineteenth century attorneys general discloses that the litigative activity of these officers was usually slight.

⁹ It has been asserted that the attorney general's foremost function is that of “principal legal advisor to the governor” and that, concomitantly, “the attorney general does not make public policy which is subject to voter approval or rejection.” W. HEISEL AND I. HESSLER, *STATE GOVERNMENT FOR OUR TIMES: NEW LOOK AT OHIO'S CONSTITUTION* 71 (1970). Another writer declared that Ohio's attorney generalship is, at least “largely,” a “ministerial administrative” post. Walker, *The Executive Department in Ohio*, in *AN ANALYSIS AND APPRAISAL OF THE OHIO STATE CONSTITUTION 1851-1951*, at 36 (H. Walker ed. 1951). It was suggested in both these studies that gubernatorial appointment is the preferable method of selecting Ohio's attorney general. The office of attorney general is, of course, elective in Ohio. See OHIO CONST. art. III, § 1.

I. CREATION OF THE OFFICE OF THE ATTORNEY GENERAL IN OHIO

Ohio's attorney general is "chief law officer for the state and all of its departments."¹⁰ In consonance with the prevailing circumstance in the United States, the attorney general is a constitutional executive officer in Ohio. Unlike the majority of states, however, Ohio did not establish the office of attorney general concurrently with or soon after the attainment of its statehood in 1803.

The first constitution of Ohio, which was adopted in November of 1802¹¹ and remained in force until supplanted by Ohio's present constitution in 1851, contained no authorization for an attorney general or kindred legal officer on any level of state government.¹² The sparse records of the framers' deliberations¹³ do not indicate whether the creation of the office of attorney general was pondered during the brief constitutional convention. Thus Ohio was without a legal officer possessing statewide authority for over four decades.

In 1846, the General Assembly passed "An Act to create the office of Attorney General, and to prescribe his duties,"¹⁴ which provided for the election by both houses of the general assembly of an attorney general who would hold office for a term of five years and

¹⁰ OHIO REV. CODE ANN. § 109.02 (Page 1969).

¹¹ Congress enacted legislation "to enable the people of . . . [Ohio] to form a constitution and state government, and for admission of such state into the Union, on an equal footing with the original States." Act of April 30, 1802, ch. XL, 2 Stat. 173. Delegates from throughout Ohio convened at Chillicothe on November 1, 1802, and, being "expeditious in its work," the convention adjourned a mere four weeks later. Watson, *The Early Judiciary, Early Laws and Bar of Ohio*, in 3 OHIO ARCHAEOLOGICAL AND HISTORICAL SOCIETY PUBLICATIONS 141, 151 (1891). The delegates decided against submitting their work to the electorate. JOURNAL OF THE CONSTITUTIONAL CONVENTION 15-16 (1802). Instead, the constitution "was adopted by the convention and went into effect at once." Ryan, *From Charter to Constitution: Introduction*, in 5 OHIO ARCHAEOLOGICAL AND HISTORICAL SOCIETY PUBLICATIONS vii, xiii (1897). See JOURNAL OF THE CONSTITUTIONAL CONVENTION 45 (1802).

¹² The executive article of the 1802 constitution, article II, conferred the state's "supreme executive power" upon the Governor in section I and thereafter detailed his authority. Section 16 of article II provided for appointment of a secretary of state by the General Assembly. Article VI provided for appointment of additional "civil officers" who would today be included within the executive branch of state government, such as the state treasurer and auditor. OHIO CONST. OF 1802 art. VI, § 2. The only county civil offices expressly created were those of sheriff and coroner. *Id.* art. VI, § 1. The term "attorney general" did, however, appear in the text of the constitution: it was stipulated that an "attorney general" was among the persons ineligible for membership in the General Assembly. *Id.* art. I, § 26. Presumably, the framers therein had reference to attorneys general of the other states and the federal government.

¹³ The only extant official account of the convention is the JOURNAL OF THE CONSTITUTIONAL CONVENTION (1802). Containing a mere forty-six pages, it reports only the barest outline of the convention proceedings. The journal reflects the delegates' voting activities with regard to a variety of matters, but it features no information concerning the substance of the convention debates. The Journal is reproduced in Ryan, *From Charter to Constitution*, in 5 OHIO ARCHAEOLOGICAL AND HISTORICAL SOCIETY PUBLICATIONS, 80-132 (1879).

¹⁴ 44 Ohio Laws 45 (1846).

described a variety of functions attendant to the new office.¹⁵ The attorney general was charged with substantial responsibility for representing the interests of the state in court,¹⁶ and was instructed to "give legal opinions" to certain state officials "when required thereto."¹⁷ The General Assembly also required that the attorney general institute litigation in specified circumstances,¹⁸ and stated that he could enlist the aid of county prosecutors in such endeavors.¹⁹ Finally, the newly created official was assigned various administrative duties²⁰ and was afforded several procedural prerogatives.²¹ Thus the duties whose discharge was imposed upon this statutory officer substantially coincided with the traditional functions of common-law attorneys general. However, the language of the statute was mandatory in form, facially reserving scant room for discretionary attorney general action.²² Although the authority vested in the position by the General Assembly was never subjected to judicial assay, Henry Stanbery, the only person to hold office pursuant to the 1856 legislation, seemingly viewed his post as a ministerial one.²³

¹⁵ *Id.* § 1.

¹⁶ The enactment mandated that the attorney general "appear for the state" in all cases tried or argued "in the supreme court in bank" and in which the state was a party or was interested. *Id.* § 3. The legislation also commanded that he appear "in any court or tribunal" in similar litigation "when required by the governor, or either branch of the legislature." *Id.* § 4.

¹⁷ *Id.* § 7.

¹⁸ *See id.* § 5 (prosecute certain indictable offenses "at the request of the governor, secretary, auditor, or treasurer"), § 6 (prosecute official bonds of delinquent officeholders), § 8 (initiate quo warranto proceeding "[u]pon complaint made to him" that a corporation has acted illegally), § 9 (initiate quo warranto proceedings on the basis of his own knowledge or when so directed by the supreme court or the General Assembly), § 10 (prosecute delinquencies of state revenue personnel).

¹⁹ *Id.* § 12. The attorney general was also assigned the duty of furnishing advice to the prosecuting attorneys on request. *Id.* § 13.

²⁰ *See id.* § 14 (compilation of crime statistics annually submitted by the various prosecuting attorneys), § 15 (maintenance of certain records), § 16 (submission of yearly report to the legislature).

²¹ *See id.* §§ 18, 19, 20.

²² All provisions of the Act relating to the functions of the office created therein were couched in compulsory terminology, declaring that the attorney general "shall" perform, *id.* §§ 3, 4, 5, 6, 7, 15, 16, or that it "shall be his duty" to perform, *id.* §§ 8, 9, 10, 11, 13. Moreover, litigative action or dissemination of legal advice by the attorney general was largely to be predicated by requests emanating from some other government official or institution. *See id.* §§ 4, 5, 7, 9, 11, 13. *But see id.* §§ 3, 6, 10.

²³ A perusal of Mr. Stanbery's depiction of his conduct conveys the impression that he perceived the bounds of his authority to be stringently described by statute so that he possessed virtually no discretionary latitude with respect to the initiation of action. *See generally* 1846 ANNUAL REP. OF THE ATT'Y GEN.; 1847 ANNUAL REP. OF THE ATT'Y GEN.; 1849 ANNUAL REP. OF THE ATT'Y GEN.; 1850 ANNUAL REP. OF THE ATT'Y GEN. The 1846 attorney general legislation was twice amended, but these legislative alterations did not include any significant additions to the attorney general's powers and duties. *See* Act of Feb. 24, 1848, 46 Ohio Laws 94; Act of March 19, 1849, 47 Ohio Laws 55.

The constitution of 1851 wrought significant changes in the composition of the executive department of Ohio's government. Among other changes the framers of the 1851 constitution included within the executive department a state attorney general: "The Executive Department shall consist of a governor, lieutenant governor, secretary of state, auditor, treasurer and attorney general"²⁴ Unlike the provisions concerning the Governor and Lieutenant Governor,²⁵ however, the text of article III did not expressly ascribe any powers and duties to the attorney general.²⁶ The framers merely provided for the election of an attorney general, specified his term in office and mandated that the several executive officers "receive, for their services, a compensation to be established by law."²⁷ Moreover, the written account of the convention proceedings does not shed appreciable light upon the delegates' individual or collective cogitation regarding the inclusion of the office of attorney general in the constitution.²⁸ As respects the authority of the attorney general, article III of the constitution of 1851 has not been materially altered since its promulgation,²⁹ although the functioning of the attorney general has been an intermittent focus of legislative attention.³⁰

²⁴ OHIO CONST. OF 1851 art. III, § 1.

²⁵ The framers conferred upon the Governor essentially the same characteristics accorded that officer under the constitution of 1802. *See id.* §§ 5-11. The function of the newly-created office of Lieutenant Governor, though quite narrow, was also textually described. *Id.* §§ 15, 16.

²⁶ Technically, the framers did specify two functions of the attorney general. In common with the other executive officers, the attorney general was given the obligation to supply the Governor with requested information "upon any subject relating to the duties" of the attorney general. *Id.* § 6. Additionally, each officer of the executive branch was required to periodically report to the General Assembly via the Governor. *Id.* § 20.

²⁷ *Id.* § 19.

²⁸ The committee of the whole engaged in no recorded discussion concerning either the prudence of constitutionally establishing the office or the factors that caused them to do so. Any such deliberation likely transpired within the committee of the executive, whose internal work apparently was not reported. Indeed, there was exceedingly little discourse among the committee of the whole regarding the composition of the executive article. Most of the discussion in this vein dealt with grammatical or relatively trivial substantive issues. *See* 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO 1850-51, at 287-91, 349, 756, 834-35 (1951). There was a divergence of opinion with respect to the creation of the office of Lieutenant Governor. *See id.* at 331-33. However, there was no kindred dispute within the committee of the whole concerning the office of attorney general.

²⁹ The term of office of the attorney general, which was two years pursuant to OHIO CONST. OF 1851 art. III, § 2, is now four years. *See* OHIO CONST. art. III, § 2. Otherwise, the constitutional provisions bearing upon the attorney general's functions remain substantively unchanged from their original character. *See id.* §§ 1, 6, 19, 20.

³⁰ The General Assembly first addressed the matter in the spring of 1852, enacting "An Act to prescribe the duties of the Attorney General," 50 Ohio Laws 267 (1852). For an assessment of current statutes relating to the attorney general, see notes 128-50 *infra* and accompanying text.

II. THE SCOPE AND NATURE OF ATTORNEY GENERAL POWER UNDER ARTICLE III OF THE OHIO CONSTITUTION

Either of two conclusions is inferable from the vacuity of the language employed in the 1851 constitution to create the office of the attorney general: the framers either believed the bare term "attorney general" to be sufficiently descriptive to render superfluous any further elaboration of the character of the officer given that designation or, quite the contrary, they wished that the attorney general constitute a lifeless shell until his position was legislatively infused with substantive content. A review of relevant Ohio political history and an application of pertinent principles of constitutional interpretation reveal that only the former inference may be acceptably drawn, and that Ohio's attorney general is constitutionally granted the basic traits of the common law attorney general.

A. *The Creation of the Office of Attorney General Placed in Historical Perspective.*

Ohio is similar to several other states in which the office of attorney general was statutorily originated prior to its recognition in the state constitution. In one of those other jurisdictions, New Mexico, the state supreme court has firmly adhered to the view that because creation of the office of attorney general was initially accomplished legislatively in that state, the subsequent mention of the office in the state constitution was an essentially meaningless exercise. That court stated in *State v. Davidson* that the doctrine of implied common-law powers in the attorney general "is based entirely upon the initial premise that the Attorney General was recognized as being vested with common-law powers before any attempt was made to enumerate or define his powers by statute."³¹ The court then determined that, rather than the traditional common law attorney general concept, it was the character of the preexisting statutorily described office which the drafters of New Mexico's constitution had intended to incorporate in their usage of the term "attorney general." Accordingly, the court held that the attorney general of that state could operate only within the ambit of legislative directives.³² Although the

³¹ 33 N.M. 664, 668, 275 P. 373, 375 (1929).

³² After noting that the statutory creation of the office of attorney general transpired "long prior to the adoption of the common law in this jurisdiction," *id.* at 668, 275 P. at 375, the court concluded:

It will thus be seen that the office of Attorney General in New Mexico was created by statute, and its powers and duties defined and limited by statute from its inception. We therefore hold that the doctrine upon which the state relies is inapplicable here,

rationale and holding of *State v. Davidson* have been persuasively criticized by differing authorities as being either too narrow³³ or overly broad,³⁴ the decision was expressly affirmed in the much more recent case of *State v. Reese*.³⁵ Since the history of the office of attorney general in Ohio is, in its barest rudiments, akin to the sequence of events which led the *Davidson* and *Reese* courts to determine that the New Mexico attorney general is a creature of statutory proportions only, it might be suggested that the *Davidson* doctrine should be applied in Ohio. It is hence germane to examine more closely the circumstances that attended the inclusion of the attorney general in article III of the 1851 Constitution of Ohio.

Of course, the scope of the attorney general's charter ultimately rests upon the intent of the framers of the constitution of 1851 in organically establishing that officer as a member of the executive branch of state government. Although, as noted, the journals of the constitutional convention fail to directly illumine that intent, the convention records and the tenor of the constitution itself do reveal an unmistakable predilection among the convention delegates for enhancing the authority of the executive and, to a lesser extent, judicial departments at the expense of the legislature. The prevalence of this attitude in the middle of the nineteenth century among the framers, as well as the citizenry as a whole, is readily understandable when assessed in the context of prior experience with government in Ohio. Moreover, consideration of the governmental history of Ohio preceding 1850 casts some light upon the likely motivation for the constitutional establishment of the office of attorney general at that juncture.

The environs that became the State of Ohio in 1803 were previously a portion of the Northwest Territory. Congress had enacted the Ordinance of 1787³⁶ to ensure the maintenance of order in the

and that no common-law powers were confirmed in the office of Attorney General by our Constitution.

Id. at 668-69, 275 P. at 375.

³³ See DeLong, *Powers and Duties of the State Attorney-General in Criminal Prosecutions*, 25 J. CRIM. L.C. & P.S. 358, 370 (1934).

³⁴ See Sheppard, *Common Law Powers and Duties of the Attorney General*, 7 BAYLOR L. REV. 1, 3 & n.7 (1955).

³⁵ 78 N.M. 241, 430 P.2d 399 (1967). The Supreme Court of New Mexico subsequently reiterated that the attorney general of that state does not enjoy inherent common-law authority in *State ex rel. Norwell v. Credit Bureau of Albuquerque, Inc.*, 85 N.M. 521, 524, 514 P.2d 40, 43 (1973). The *Reese* court purported to thoroughly review the question of state attorney general authority but revealingly added, perhaps with more candor than wisdom, that "[e]ven if it appeared to us that [the *Davidson* court had been] mistaken or misled, we would hesitate to overturn a decision so far-reaching in its implications which has gone unchallenged for almost forty years." 78 N.M. at 248, 430 P.2d at 406.

³⁶ An ordinance for the government of the United States northwest of the river Ohio, July 13, 1787, 4 JOURNALS OF CONGRESS 752 (1823). Enacted by the Continental Congress operat-

Territory until three to five territorial segments would become eligible for statehood. In addition to securing several fundamental rights for inhabitants, the Ordinance of 1787 made provision for a territorial government. Congress was to appoint a governor, a secretary and "a court, to consist of three judges, any two of whom to form a court, who shall have a common law jurisdiction."³⁷ While the Ordinance granted the secretary only ministerial duties, it conferred exceedingly broad authority upon the judges and the governor, especially the latter.³⁸

The vast powers devolving upon the territorial governor were wielded to their utmost extent by the man Congress appointed to fill that post, the autocratic Arthur St. Clair.³⁹ Governor St. Clair, a Revolutionary War general, zealously seized every opportunity to exert control over the government of the territory, and continually subverted the will of the General Assembly through the exercise of his absolute veto power.⁴⁰ Both the person of St. Clair and the office of governor as an institution became objects of revulsion and distrust among the citizenry,⁴¹ and this widespread discontent was amply

ing under the Articles of Confederation, the Ordinance had a profound impact upon the course of westward expansion in the United States. See D. RYAN, *HISTORY OF OHIO* 26-27 (1888). For a fine brief account of the events leading up to Ohio's attainment of statehood, including the effect of the Ordinance of 1787, see S. Chase, *A Preliminary Sketch of the History of Ohio*, in 1 *STATUTES OF OHIO* 2 (1833). Citations to the Ordinance herein are to its text as reproduced in 1 M. CURWEN, *REVISED STATUTES OF OHIO* 86-92 (1853).

³⁷ 1 M. CURWEN, *REVISED STATUTES OF OHIO* 87 (1853).

³⁸ Under the terms of the ordinance of 1787, the period of transition from territorial status to eventual statehood was bifurcated. During the initial stage, the judges and Governor, acting in concert with majority rule, were empowered to adopt "such laws of the original states, criminal and civil, as may be necessary, and best suited to the circumstances of the district." The Governor was also to "appoint such magistrates and other civil officers . . . as he shall find necessary." The second phase of the territorial government was to commence with the election of a General Assembly when the territory achieved a population of "five thousand free male inhabitants, of full age." Thereafter, the lawmaking power was to jointly reside in the hands of the house of representatives, a legislative council composed of five persons selected from the membership of the house and the Governor. The Governor could "convene, prorogue and dissolve the general assembly, when, in his opinion, it shall be expedient." More importantly, Congress provided that "no bill or legislative act whatever, shall be of any force without his assent," thus supplying the Governor with the prerogative of insuperable veto. *Id.* at 87-89.

³⁹ Even a later St. Clair apologist, prefatory to an extended encomium to the territorial Governor, was constrained to admit that the central figure in his essay was "unfortunately . . . arbitrary and unyielding to a degree and rarely conceded an opinion when deliberately formed." Gholson, *Ohio's First Election and the Campaign Preceding It*, 4 *OHIO L. REP.* 413, 415 (1906). Among the charges levelled against St. Clair by his many detractors was that the Governor was an "aristocrat." *Id.* at 416. One of the territorial judges, labelling St. Clair a "despot," remonstrated that the Governor was "at war with those who do not approach him with adulation on their tongue." Letter from John Cleves Symmes to Thomas Jefferson, January 23, 1802, in 3 C. CARTER, *TERRITORIAL PAPERS OF THE UNITED STATES* 205 (1934).

⁴⁰ See Gholson, *supra* note 39, at 415-16; 3 E. RANDALL AND D. RYAN, *HISTORY OF OHIO: THE RISE AND PROGRESS OF AN AMERICAN STATE* 81 (1912).

⁴¹ See Gholson, *supra* note 39, at 414-27; D. RYAN, *HISTORY OF OHIO* 41-57 (1888); C.

manifested when Ohio became the first state from the Northwest Territory to gain admission to the federal union.

When the first constitutional convention began in 1802, the delegates, reflecting the sentiments of the general population, were overwhelmingly opposed to St. Clair⁴² and predisposed to prevent any possibility that the gubernatorial hegemony which had permeated the territorial experience could be duplicated in the government of the new state. Overreacting to their fear of a strong executive, the framers outlined a scheme of government in which the legislature was omnipotent and the governorship was reduced to merely nominal importance—a “name almost without meaning.”⁴³ The General Assembly was accorded the privilege of choosing, or at least specifying the manner of selecting, persons to occupy virtually all significant government positions.⁴⁴

The residence of such extreme power in the province of the General Assembly was later regretted, and by mid-century there was pervasive recognition of a need for balance among the three departments of state government. Therefore, the framers of the constitution of 1851 accorded enhanced authority to the executive branch. The power of the Governor was supplemented in some respects,⁴⁵ but

WALKER, OHIO COMPANY SETTLEMENTS IN OHIO TO 1868, at 141-42 (O. Morrison ed. 1967); Woodbridge, *A History of Separation of Powers in Ohio: A Study in Administrative Law*, 13 U. CIN. L. REV. 191, 206 (1939).

⁴² Of the thirty-five delegates to the convention, twenty-six were confirmed Jeffersonian republicans and hence opponents of St. Clair. See Letter from Thomas Worthington to Thomas Jefferson, November 8, 1802, in 3 C. CARTER, TERRITORIAL PAPERS OF THE UNITED STATES 254 (1934). The general antipathy of the delegates toward the Governor is most tellingly depicted by their response to his appearance at the convention. Predictably, St. Clair attempted to superintend the assemblage in his official capacity. This overture was speedily rebuffed by the delegates. A slight majority of the delegates eventually did authorize St. Clair to address the convention. See JOURNAL OF THE CONSTITUTIONAL CONVENTION 8 (1802). However, even this lowly courtesy was granted only after, in the words of one delegate, the territorial governor “again appeared & begged [*sic*] leave not as a public officer, but as a private Citizen to make a few observations.” Letter from John Smith to Thomas Jefferson, November 9, 1802, in 3 C. CARTER, TERRITORIAL PAPERS OF THE UNITED STATES 255 (1934).

⁴³ Walker, *The Executive Department in Ohio*, in AN ANALYSIS AND APPRAISAL OF THE OHIO STATE CONSTITUTION 1851-1951, at 35 (H. Walker ed. 1951). See Gholson, *supra* note 39, at 426; W. HEISEL AND I. HESSLER, STATE GOVERNMENT FOR OUR TIMES - NEW LOOK AT OHIO'S CONSTITUTION 68-69 (1970); Woodbridge, *supra* note 41, at 217.

⁴⁴ See OHIO CONST. OF 1802 art. II, § 16 (“Secretary of State shall be appointed by a joint ballot of the Senate and House of Representatives”); art. III, § 8 (judges of constitutional courts “shall be appointed by a joint ballot of both houses of the General Assembly”); art. III, § 1 (legislature may establish additional courts); art. V, § 5 (uppermost ranking militia officers appointed by joint ballot of both houses); art. VI, § 2 (state treasurer and auditor appointed by legislature); art. VI, § 4 (other “civil officers” appointed “in such manner as may be directed by law”).

⁴⁵ The textual exposition of the Governor's authority was not altered appreciably. The pardoning power of the Governor was expanded to encompass “reprieves, commutations, and pardons, for all crimes and offenses except treason and cases of impeachment, upon such

lingering wariness of excessive concentration of authority in that office prevented the approval of a gubernatorial veto power.⁴⁶ Thus the framers of the 1851 constitution desired both to curb the then-existing surfeit of legislative strength⁴⁷ and to simultaneously preclude a recurrence of the problems engendered by the overly powerful governorship under the Ordinance of 1787. It is plausible that in this atmosphere the framers sought to augment the power of the executive branch generally without correspondingly contributing to the authority of the governor. The creation of an attorney general who is neither directly accountable to nor totally dependent upon the Governor or the General Assembly is a logical measure for achievement of the type of interdepartmental balance desired.

Accordingly, the rationale advanced in *Davidson* and followed in *Reese*, whatever its analytical vitality in New Mexico, is hardly compatible with the governmental history of Ohio. The attributes of the article III attorney general were not meant to be coterminous with the powers and duties of the Attorney General created by the General Assembly in 1846. Indeed, it appears that, in accordance with the principle that inconsistent preexisting legislation is abrogated by the adoption of a new constitution,⁴⁸ the 1846 attorney general act ceased to be law in 1851.⁴⁹ Hence the lessons of history

conditions as he may think proper." OHIO CONST. art. III, § 11. Otherwise, the express power of the Governor remained essentially unchanged. Compare OHIO CONST. OF 1851 art. III, §§ 5-10, with OHIO CONST. OF 1802 art. II, §§ 1, 4, 7, 9-11. Nevertheless, the framers desired that Ohio should have an "active Governor." See 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1850-51, at 175 (1851). This goal was to be accomplished indirectly, however, by liberating the state government from the domination of the General Assembly. See note 47 *infra*.

⁴⁶ See Woodbridge, *supra* note 41, at 218-20.

⁴⁷ One convention delegate voiced the prevailing philosophy as follows:

Under the old Constitution, the legislature swallowed up the rest of the government. They constituted not only the Legislature, but the Executive and Judiciary to some extent . . . [B]y confining the Legislature to their appropriate law making functions, we shall have accomplished everything the people have asked for; that is, we shall have established a just equilibrium . . . thus restoring the harmony that has been so long disturbed under the old Constitution, in all the different departments of government.

1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1850-51, at 175 (1851). See *id.* at 123. The framers accordingly stripped the General Assembly of much of the authority which that body could wield under the constitution of 1802, particularly its powers, mentioned in note 44 *supra*, concerning the other officers of state government. For an excellent concise review of the reforms implemented by the framers of the constitution of 1851, see Woodbridge, *supra* note 41, at 217-24.

⁴⁸ OHIO CONST. schedule, § 1. See *State v. Medberry*, 7 Ohio St. 522 (1857); *Cass v. Dillon*, 2 Ohio St. 607 (1853).

⁴⁹ It is evident from the enactment of the 1852 statute prescribing the attorney general's duties, see note 30 *supra*, that the 1846 attorney general legislation did not survive the effectuation of the constitution of 1851. The 1846 Act was amended on two occasions, with each amendment specifying in its title that it had reference to the 1846 legislation. See Act of Feb.

persuasively, albeit circumstantially, commend the view that the framers of the constitution of 1851 created an attorney general who is immune from the seasonal whims of the legislature—in essence, a common-law attorney general.⁵⁰

B. *The Applicability of English Common Law Principles in Ohio*

In the decisions of other American jurisdictions, recognition of the viability of English common law principles within a state has typically been a signal constituent of the process of judicial determination that the attorney general of that state may, at least in the absence of legislative withdrawal of that power, invoke the full measure of authority enjoyed by his English progenitors.⁵¹ A number of states have, by express legislation, incorporated into their own compendia of legal rules the common law and related statutes of England as they prevailed at some particular point in history. Such statutory reception of English common law has often been accentuated during the course of judicial explication of state attorney general authority, usually leading a court to conclude that the attorney general in its state is vested with the entire complement of traditional-extra-statutory powers and duties, at least in the absence of explicit legislative abrogation.⁵²

24, 1848, 46 Ohio Laws 94; Act of March 19, 1849, 47 Ohio Laws 55. The title of the 1852 legislation gave no indication that it was enacted to supplement, modify or repeal the 1846 statute. See An Act to prescribe the duties of the Attorney General, May 1, 1852, 50 Ohio Laws 267. Moreover, the 1852 Act duplicated the 1846 legislation in some of its particulars. Compare *id.* §§ 3-7, 9-11, 15-18, with 1846 Act §§ 3-11, 13, 44 Ohio Laws 45 (1846). Thus, much of the former statute would have been superfluous had the latter persisted beyond the adoption of the new constitution. Therefore, since (1) the 1846 Act was not expressly repealed and (2) it was apparently no longer operative in 1852, it is logical to surmise that it was abrogated in 1851 by virtue of its inconsistency with article III of the constitution of 1851. This being the case, it would seem clear that the 1846 attorney general legislation did not serve as the model for the article III attorney general.

⁵⁰ There is yet another fundamental reason for the inappropriateness of the *Davidson-Reese* rule in Ohio. In New Mexico, the office of district attorney is a constitutional position. Indeed, the New Mexico constitution designates the district attorney "the law officer of the state." *State v. Reese*, 78 N.M. 241, 247, 430 P.2d 399, 405 (1967) (citing NEW MEXICO CONST. art. VI, § 24). The exalted status of the district attorney was one determinant of the *Reese* court's holding that the New Mexico attorney general can act only pursuant to statutory authorization. In Ohio, the attorney general is the sole constitutional governmental law officer. Although there is a prosecuting attorney in each Ohio county, prosecuting attorneys are officials of only local and purely statutory power. See notes 151-67 *infra* and accompanying text.

⁵¹ See, e.g., *Fergus v. Russel*, 270 Ill. 304, 337, 110 N.E. 130, 143 (1915); *State v. Finch*, 128 Kans. 665, 671, 280 P. 910, 913 (1929).

⁵² See, e.g., *State ex rel. Williams v. Karstan*, 208 Ark. 703, 707, 187 S.W.2d 327, 329 (1945); *State ex rel. McKittrick v. Missouri Pub. Serv. Comm'n*, 352 Mo. 29, 36, 175 S.W.2d 857, 861 (1943). An unusual twist was applied to this rationale in *Commonwealth ex rel. Ferguson v. Gardner*, 327 S.W.2d 947 (Ky. 1959). The *Gardner* court found that the attorney general of Kentucky possessed common-law powers by virtue of that state's statutory adoption

Although no such statutory reception of the English common law has been in effect in Ohio since 1806,⁵³ judicial pronouncements leave no doubt that the common law has always served as the rules of decision within the state. In 1855 the supreme court summarized

of the English common law as it existed in 1607. However, the court held that the attorney general could not intervene in a will contest because it was not demonstrated that, as of 1607, the English attorney general was empowered to undertake such a maneuver. The court thus embraced the common-law attorney general concept but did so in a quite wooden fashion, virtually "freezing" the concept as it was constituted at the time of initial English colonization of North America, and thereby eviscerating its salutary fluidity. In this respect *Gardner* is something of an analogue to *Fergus v. Russel*, 270 Ill. 304, 110 N.E. 130 (1915), in which the Illinois Supreme Court declared that state's attorney general to be constitutionally insulated from any legislative impingement upon his common-law powers. It is submitted that "freezing" the common-law attorney general concept nullifies its most prominent and historically most valuable characteristic: the capacity for ready adaptability to incipient fluctuations in the need for legal representation of the public interest. See *Johnson v. Commonwealth ex rel. Meredith*, 291 Ky. 829, 165 S.W.2d 820 (1942).

The existence of a statute legitimating the common law of England may also militate against the possession by a state attorney general of inherent common-law powers. In New Mexico the constitutional recognition of the office of attorney general preceded the enactment of the reception statute. This sequence was noted by the court in *State v. Reese*, 78 N.M. 241, 430 P.2d 399 (1967), as a supplemental ground for its ratification of the *Davidson* holding that the New Mexico attorney general may not invoke common-law powers.

⁵³ Among the laws adopted by Governor St. Clair and the territorial judges for application within the Northwest Territory was a Virginia enactment that constituted as rules of decision the common law of England and all English statutes of a general nature enacted prior to 1607, the date of Virginia's colonization. Act of October 1, 1795, 1 S. CHASE, STATUTES OF OHIO 190 (1833). This legislative adoption by the territorial government was apparently recognized as retaining validity in Ohio notwithstanding the transition to statehood in 1803. See *Crawford v. Chapman*, 17 Ohio 449, 452 (1849); *Drake v. Rogers*, 13 Ohio St. 21, 28 (1862). But cf. *State ex rel. Donahey v. Edmonson*, 89 Ohio St. 93, 105 N.E. 269 (1913) (Ordinance of 1787 "entirely superseded" by the Ohio Constitution of 1802). At any rate, the effectiveness of the Virginia reception statute in Ohio was explicitly preserved by the General Assembly in 1805. See Act of February 14, 1805, in 1 S. CHASE, STATUTES OF OHIO 512 (1833). The duration of this measure was quite brief, however, and the same body repealed it the succeeding year. Act of January 2, 1806, 4 Ohio Laws 38. Since that time there has been operative in Ohio no legislation that unequivocally and comprehensively embraces the common law of England. But see OHIO REV. CODE ANN. § 1.11 (Page 1969). See also *id.* § 1.49 (D) (Page Supp. 1975).

The intent which underlay the General Assembly's 1806 abrogation of the reception statute defies conclusive ascertainment. It is nonetheless well established that the action did not effect a wholesale repudiation of English common law as the cornerstone of Ohio jurisprudence. In its 1849 decision in *Crawford v. Chapman*, 17 Ohio 449 (1849), the Supreme Court of Ohio declared that the 1806 repeal of the reception statute vitiated the force of pre-1607 English statutes in Ohio but did not expunge the principles of English common law from the corpus of Ohio law. Thirteen years later, the court reiterated and clarified the position it had expressed in *Chapman*, adding:

It does not, however, follow from these acts [the adoption and repeal of the reception statute] of the legislature, that the common law of England is not in force in this state. To the same extent, . . . if the act of 1795 had never been enacted, the common law of England has doubtless continued to be recognized as the common law of this state.

Drake v. Rogers, 13 Ohio St. 21, 29 (1862).

the status of the English common law in Ohio in the following language:

It has not been adopted by express legislative enactment. . . . Its introduction here . . . was almost a matter of course, and its terms and foundation principles have been so interwoven with our constitution and laws, so blended with the remedies we afford, and so consistently enforced by the courts, that its implied recognition by the government and the people, may be fairly assumed; and if it cannot be said to be in force as the common law of England, it may not inaptly be termed the common law of Ohio.⁵⁴

The court accordingly concluded: "The common law of England, when not inconsistent with the genius and spirit of our own institutions, and thus rendered inapplicable to our situation and circumstances, furnishes the rule of decision in the courts of this State."⁵⁵

In addition to providing substantive rules, the English common law has been widely used in Ohio to furnish interpretive aid in the construction and application of written law. It has often been held that enactments of the General Assembly are to be construed consistently with the common law,⁵⁶ and that statutory terminology is to be assayed in light of the meaning that the common law attached to particular words.⁵⁷ Indeed, so strong is Ohio's common law heritage that the General Assembly has admonished that salient common law principles and concepts be consulted for guidance in the judicial inter-

⁵⁴ *Cleveland, C. & C.R.R. v. Keary*, 3 Ohio St. 201, 205 (1855).

⁵⁵ *Id.* at syllabus paragraph 2. *See Kerwhacker v. Cleveland, C. & C.R.R.*, 3 Ohio St. 172, 178 (1855); *Bloom v. Richards*, 2 Ohio St. 387, 391 (1854); *Lessee of Hall v. Ashby*, 9 Ohio 96, 98 (1839); *Sergeant v. Steinberger*, 2 Ohio 305, 306 (1826); *Lessee of Lindsley v. Coats*, 1 Ohio 243, 245 (1824). *See also* *Fulton v. Stewart*, 2 Ohio 216 (1825). Yet cases can be found in which Ohio jurists openly rejected legal maxims developed in England. *See Knapp v. Thomas*, 39 Ohio St. 377, 385 (1883); *Kerwhacker v. Cleveland, C. & C. R.R.*, 3 Ohio St. 172, 179 (1855); *Stilley v. Folger*, 14 Ohio 610, 650 (1846); *Fleming v. Donahoe*, 5 Ohio 255 (1832); *Doe v. Gibson*, 2 Ohio 339 (1826); *Sergeant v. Steinberger*, 2 Ohio 305 (1826); *Lessee of Lindsley v. Coats*, 1 Ohio 243 (1824). These few instances were predicated on the impertinence of particular principles of English common law to circumstances indigenous to Ohio.

⁵⁶ *See Miller v. Fairley*, 141 Ohio St. 327, 333-34, 48 N.E.2d 217, 222 (1943); *City of Wooster v. Arbenz*, 116 Ohio St. 281, 287, 156 N.E. 210, 212 (1927); *Chilcote v. Hoffman*, 97 Ohio St. 98, 101-02, 119 N.E. 364, 365 (1918); *State ex rel. Morris v. Sullivan*, 81 Ohio St. 79, 95-96, 90 N.E. 146, 149-50 (1909).

⁵⁷ *See, e.g., Smith v. Buck*, 119 Ohio St. 101, 102-08, 162 N.E. 382, 382-84 (1928); *State ex rel. Nead v. Nolte*, 111 Ohio St. 486, 491, 146 N.E. 51, 52-53 (1924). The supreme court voiced its belief in the worth of the common law as an aid in the construction of statutes at an early date, saying:

[W]e must look to the common law, for we have no other guide. Can it be said, then, that the common law is not in force, when without its aid and sanction, justice cannot be administered; when even the written laws cannot be construed, explained and enforced, without the common law, which furnishes the rules and principle of such construction?

Ohio v. Lafferty, Tappan, 81, 82 (1817).

pretation of its enactments.⁵⁸ More importantly, the supreme court in *State v. Wing* acknowledged that Ohio's constitution was "adopted with a recognition of established contemporaneous common law principles, and . . . did not repudiate, but cherished the established common law."⁵⁹ Thus it quite cogently appears that the common law was of sufficient strength and clarity in Ohio in 1852 that the framers of the constitution, by employing the traditional Anglo-American title for the chief law officer of the sovereign, meant to and did establish an attorney general of broad inherent power.

This conclusion is reinforced by supreme court decisions determining the extent of powers possessed by other constitutionally created state officers and bodies with common-law analogues. For example, the supreme court in *State ex rel. Doerfler v. Price*⁶⁰ declared that the term "grand jury" in Ohio's constitution carries the same signification that it possessed under the common law.⁶¹ Similarly, Ohio courts have often turned to the common law for ascertainment of the scope of authority bestowed upon them through the constitutional allocation of "judicial power" to the courts.⁶²

⁵⁸ See OHIO REV. CODE ANN. § 1.49(D) (Page Supp. 1975). See also *id.* § 1.11 (Page 1969).

⁵⁹ *State v. Wing*, 66 Ohio St. 407, 420, 64 N.E. 514, 516 (1902). See *Summons v. State*, 5 Ohio St. 325, 341 (1855).

⁶⁰ 101 Ohio St. 50, 128 N.E. 173 (1920).

⁶¹ *Id.* at 54, 128 N.E. at 174. The Supreme Court of Ohio employed the same reasoning in determining the signification of the term "jury" as used for the United States Constitution: "The jury system . . . was so well established that the framers of the Constitution did not deem it necessary to define it, but recognized it as an institution, and made reference to it by name only, . . . as it then existed at common law." *Schwindt v. Graeff*, 109 Ohio St. 404, 405-06, 142 N.E. 736, 736 (1942).

⁶² Ohio's constitution grants the state's "judicial power" to the various courts established therein and such other courts that might be created by the General Assembly. OHIO CONST. art. IV, § 1. The constitution also outlines the jurisdiction of the constitutional courts and specifies in some detail their composition and the manner of their functioning. *Id.* §§ 2-6. However, neither the term "judicial power" nor the word "court" has ever been defined in either of Ohio's constitutions. The determination of what the "judicial power" entails has been left to the judiciary itself, and Ohio's courts have bridged the great interstices of their own constitutional grant of power through resort to the common law. Relying on the common-law conception of "judicial power," Ohio courts have found themselves to be constitutionally clothed with an array of inherent common-law powers. See, e.g., *State v. Coulter*, Wright 421 (1833); *Hale v. State*, 55 Ohio St. 210, 45 N.E. 199 (1896) (power of court to punish for contempt); *In re Thatcher*, 80 Ohio St. 492, 89 N.E. 39 (1909) (jurisdiction to disbar an attorney); *State ex rel. Weinberger v. Miller*, 87 Ohio St. 12, 99 N.E. 1078 (1912) (inherent right and duty to overturn unconstitutional legislation). On at least two occasions, the supreme court has recognized as inherent the right of courts to promulgate rules governing their own procedure. *Meyer v. Brinsky*, 129 Ohio St. 371, 195 N.E. 702 (1935); *Cleveland Ry. v. Halliday*, 127 Ohio St. 278, 188 N.E. 1 (1933). See also Gertner, *The Inherent Power of Courts to Make Rules*, 10 U. CIN. L. REV. 32, 51-53 (1936); Comment, *The Rule-Making Power of Ohio Courts* 1 OHIO ST. L.J. 123 (1935). The rule-making power has since been expressly recognized in the constitution. OHIO CONST. art. IV, § 5(b). Central to the conclusions in the cases referred to above was a conviction that certain incidents—powers and duties—naturally attach to a tri-

The same reasoning would seem to apply with like force to the constitutional creation of the office of attorney general. By providing for the election of an officer denominated the "attorney general," the framers of Ohio's constitution logically intended that the office thereby established be charged with the duties and possessed of the authority that had been engrafted to the identically named position throughout preceding centuries. As stated by the United States Supreme Court with reference to creation of the United States Attorney General:

The judiciary act of 1789, in its third section, which first created the office of Attorney General, without any very accurate definition of his powers . . . must have had reference to the similar office with the same designation existing under the English law. And though it has been said that there is no common law of the United States, it is still quite true that when acts of congress use words which are familiar in the law of England, they are supposed to be used with reference to their meaning in that law.⁶³

The courts of other jurisdictions have also endorsed this approach to determining the inherent characteristics of attorneys general.⁶⁴ Therefore, just as the contempt power "arose upon the creation of a court because it was implied in every conception of a court,"⁶⁵ it is sensible to conclude that the attorney general of Ohio is granted, through the constitutional recognition of his office, the functions "implied in every conception of" an attorney general under common law and custom.

C. The Absence of "Prescribed by Law" or Similar Qualifying Phrases

In the majority of American jurisdictions, constitutional provisions creating the office of state attorney general conclude with language indicating that the functions of those officers are to be such as

bunal designated a court. Briefly stated, these decisions reflect a belief that the framers of the constitution in 1851 used the language "judicial power" and "court" as a readily understandable shorthand whose referent is the common law. In *Hale v. State, supra*, the court succinctly demonstrated the reasoning upon which this belief is premised:

When constitutional governments were established upon this continent there was general familiarity with the course of judicial proceedings in the administration of the common law. This power [of contempt] had long been exercised by courts as inherent. *It was within every conception of a judicial court.*

55 Ohio St. at 213, 45 N.E. at 200 (emphasis added).

⁶³ *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 280 (1888).

⁶⁴ See, e.g., *Kennington-Saenger Theatres v. State ex rel. Dist. Att'y*, 196 Miss. 841, 865-66, 18 So. 2d 483, 486 (1944); *Van Riper v. Jenkins*, 140 N.J. Eq. 99, 102, 45 A.2d 844, 845 (1946); *Gibson v. Kay*, 68 Ore. 589, 594, 137 P. 864, 866 (1914).

⁶⁵ *Hale v. State*, 55 Ohio St. 210, 213-14, 45 N.E. 199, 200 (1896).

are "prescribed by law." Language of this type has been diversely construed to contemplate assignment of powers and duties to attorneys general by legislative enactments only, by the postulates of the common law subject to statutory alteration, and, in the case of Illinois, by the teaching of the common law and consistent amendatory legislation.⁶⁶ It is perhaps, then, significant that article III, § 1 of Ohio's constitution contains no kindred qualifying terminology with respect to the office of attorney general.

In Ohio, constitutional phraseology such as "prescribed by law," "provided by law," "established by law" and similar forms of words have invariably been held by the courts to render the provisions that they modify non-self-executing. Such terms are seen to connote a purely prospective thrust, signalling the general assembly that it may enact legislation regulating or effectuating the subject of the constitutional provision in which the language is incorporated.⁶⁷ Examples of such holdings abound in Ohio case law.⁶⁸

It is, therefore, clear that the framers of the constitution of 1851 erected no legislative barriers to the election of an attorney general in Ohio: under article III, § 1, no room is left for the General Assembly to regulate whether an attorney general will take office. Presumably there is also no extra constitutional condition precedent to the commencement of the performance by the attorney general of the duties of his office.⁶⁹ And since those duties are not expressly described in the text of the constitution, it is inferable that the framers

⁶⁶ See, e.g., *Fergus v. Russel*, 270 Ill. 304, 110 N.E. 130 (1915); *State ex rel. McKittrick v. Missouri Pub. Serv. Comm.*, 352 Mo. 29, 175 S.W.2d 857 (1944); *Shute v. Frohmler*, 53 Ariz. 483, 90 P.2d 998 (1939).

⁶⁷ This phenomenon is most dramatically exemplified by the decisional history of OHIO CONST. art. I, § 16, which relegates the state amenable to suits "in such courts and in such manner, as may be provided by law." The quoted language of article I, § 16 spawned a plethora of unavailing efforts by private litigants to convince the courts that the state was constitutionally susceptible to suit. In each succeeding case, the supreme court held that the qualifying "provided by law" indicated that legislative action would be required to implement the waiver of immunity. See, e.g., *Thacker v. Board of Trustees*, 35 Ohio St. 2d 49, 298 N.E.2d 542 (1973); *Krause v. State*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972). The General Assembly exercised the option of article I, § 16 and expressly waived the sovereign immunity of the state by passing the Court of Claims Act, Act of June 4, 1974, 135 Ohio Laws 869 (codified at OHIO REV. CODE ANN. §§ 2743.01-.20 (Page Supp. 1975)).

⁶⁸ Despite recognition of a presumption that Ohio constitutional provisions are intended to be self-executing, see *State ex rel. Russell v. Bliss*, 156 Ohio St. 147, 101 N.E.2d 289 (1951), the supreme court has consistently found qualifying phrases similar to "prescribed by law" to embody permissive signals to the General Assembly. See, e.g., *Dubyak v. Kovach*, 164 Ohio St. 247, 129 N.E.2d 209 (1955) (construing OHIO CONST. art. II, § 1 ("provided by law")); CONST. art. XII, § 2 ("directed by law"); *Murray v. State ex rel. Nestor*, 91 Ohio St. 220, 110 N.E. 471 (1915) (construing OHIO CONST. art. XVIII, § 1 ("regulated by law")).

⁶⁹ Cf. OHIO CONST. art. III, § 19.

intended the attorney general to exercise the same amalgam of powers that traditionally devolved upon the office at common law.⁷⁰ Such reasoning has typically been judicially embraced in other states that feature "mere" constitutional establishment of the office of attorney general.⁷¹ Hence, the express constitutional creation of the office of attorney general, when coupled with the evident circumstance that the framers perceived no need to otherwise outline or even allude to the nature of that officer's functions, irresistably favors the conclusion that the article III, § 1 attorney general is an officer of broad common-law dimensions.

III. JUDICIAL DETERMINATIONS OF THE SCOPE OF ATTORNEY GENERAL POWER

One seeking a thorough judicial exegesis of the office of attorney general of Ohio and its attendant powers and duties will meet only frustration and disappointment since there is a dearth of decisional law addressing the issue. Definitive judicial resolution of the incidents of the office of attorney general in Ohio has been obviated by several interrelated factors. The foremost reason is that the General Assembly from 1852 to the present has explicitly authorized the attorney general to act in a quite extensive range of circumstances.⁷² Ohio statutes concerning the functions of the attorney general have always countenanced in express terms nearly the entire spectrum of activities that were undertaken by attorneys general at common law, thereby greatly reducing the immediacy of the question whether authority

⁷⁰ Of course, it must be conceded that the attorney general is superficially indistinguishable from the other major executive officers of the state—the offices of Governor, Lieutenant Governor, secretary of state, treasurer, auditor, and attorney general being recognized literally in a single breath in article II, § 1—with respect to the absence of any explicit constitutional manifestation that the charter of his office is to be entirely contingent upon the exercise of legislative grace. However, the attorney general may be materially differentiated from these other officers. Unlike the Governor, Lieutenant Governor, and secretary of state, the attorney general is not a recipient of specific powers and duties from the text of article III. In contradistinction to the treasurer and auditor, the attorney general was not recognized in the constitution of 1802 and thus did not have the core of his governmental role delineated in longstanding prior Ohio experience. Most importantly, the label "attorney general," but not the titles of other constitutional state executive officers, benefited from an extensive and well known common law heritage.

⁷¹ See, e.g., *Darling Apartment Co. v. Springer*, 25 Del. Ch. 420, 22 A.2d 397 (1941); *Howard v. Cook*, 59 Idaho 391, 83 P.2d 208 (1938); *State v. Finch*, 128 Kan. 665, 280 P. 910 (1929); *Commonwealth v. Kozlowsky*, 238 Mass. 379, 131 N.E. 207 (1921); *State ex rel. Young v. Robinson*, 101 Minn. 277, 112 N.W. 269 (1907); *Van Riper v. Jenkins*, 140 N.J. Eq. 99, 45 A.2d 844 (1946); *Commonwealth ex rel. Minerd v. Margiotti*, 325 Pa. 17, 188 A. 524 (1936). But see *State v. Davidson*, 33 N.M. 664, 275 P. 373 (1929); *Cosson v. Bradshaw*, 160 Iowa 296, 141 N.W. 1062 (1913).

⁷² See generally notes 132-50 *infra* and accompanying text.

inheres in the office of attorney general simply by virtue of its constitutional station. In view of the broad attorney general powers that have been statutorily recognized, invocation of inherent common-law power could occur in only a rather limited number of situations.

Furthermore, Ohio's attorneys general have characteristically been content to occupy a restricted role in Ohio government, discharging the more prominent duties associated with the office, but infrequently demonstrating innovative zeal in the prosecution of the public's legal business.⁷³ Because of this conservative approach to the discharge of the office, the question whether the Ohio attorney general might fully enjoy the fruits of his common law heritage has seldom been squarely presented for judicial determination. Moreover, it appears that in some situations in which that question might appropriately have been addressed the issue was neither raised by the litigants nor considered by the courts.⁷⁴

A. *Early Statutory Construction Cases: Inconclusive Dicta Concerning the Attorney General's Constitutional Powers*

Of the reported instances of litigation involving the array of powers available to the attorney general, nearly all have been disposed of on purely statutory grounds. Ohio courts have ruled adversely to the existence of statutory attorney general power in several cases.⁷⁵ Ordinarily such a judicial decision, if not accompanied by a further consideration of whether the type of authority in question attaches to the attorney general as an incident of his common-law heritage, might be taken as a tacit acknowledgment that the Attorney General is devoid of extrastatutory power. However, an inference of that nature may not be drawn from the decisions in which Ohio's attorney general has been found wanting in power; because of the contexts in which those cases arose, the decisions carry no implicit refutation of the existence of common-law attorney general authority.⁷⁶

⁷³ But see *State ex rel. Watson v. Standard Oil Co.*, 49 Ohio St. 137, 30 N.E. 279 (1892); *State v. Vanderbilt*, 37 Ohio St. 591 (1882). These cases involved the imaginative use of the attorney general's statutory quo warranto power as a tool for thwarting anticompetitive business combinations. It is not clear whether the restraint with which the office of attorney general has typically been conducted in Ohio was predicated by the officeholders' lack of fervor and imagination, their belief that the office is entirely dependent upon the legislature for guidance and initiative, or simply their understandable susceptibility to the practical constraints resulting from finite resource allocation.

⁷⁴ See, e.g., *State v. Lucas*, 85 N.E.2d 154 (Ohio C.P. Franklin Cty. 1949).

⁷⁵ E.g., *Lynch v. Board of Educ.*, 116 Ohio St. 361, 156 N.E. 188 (1927); *O'Neill v. Mutual Tool & Die, Inc.*, 138 N.E.2d 681 (Ohio C.P. Montgomery Cty. 1956).

⁷⁶ For example, in *Lynch v. Board of Educ.*, 116 Ohio St. 361, 156 N.E. 188 (1927), the Supreme Court of Ohio declined the request of the attorney general for vacation of a judgment

In a greater number of cases the courts of Ohio have rejected challenges to the statutory power of the attorney general. The most that can be said of the majority of these cases is that the courts, without extended discussion of the matter, credited the attorney general with greater independence and discretionary latitude than unambiguously emanated from the faces of the various statutes involved.⁷⁷ A number of other decisions have featured statements which

earlier rendered against the school board of Lakewood, Ohio. The Lakewood city solicitor, acting on behalf of the school board, had initiated a lawsuit against a former school official, Lynch, for a sum which allegedly had been wrongfully paid to the defendant. An Ohio statute directed that any city official filing an action for recovery of unlawfully expended public funds notify the attorney general of the commencement of the suit. The statute further expressly provided that the attorney general be permitted to appear in the actual litigation of such a lawsuit. The Lakewood solicitor failed to adequately apprise the attorney general of the action brought against Lynch, and, therefore, the attorney general was deprived of the opportunity to actively participate in the litigation. The suit proceeded to judgment, with the school board failing to establish the merit of its claim for relief. Instead, Lynch, who had filed a counterclaim, garnered an award of damages, and the judgment was thereafter satisfied by the school board.

The attorney general subsequently challenged the validity of the proceedings, contending that the solicitor's breach of statutory duty vitiated the trial court's jurisdiction of the matter and rendered the judgment a nullity. The attorney general asserted that the pertinent legislation created a "mandatory duty devolving upon his office to participate in all such actions relating to suits to recover, whether the expenditures are from the state treasury or from political subdivisions of the state, that no case can proceed to final judgment without an entry first being submitted to him, and that, unless such entry is so submitted, the judgment is void." 116 Ohio St. at 367, 156 N.E. at 190. The supreme court characterized the issue presented for decision as the nature of the attorney general's statutory "duty in regard to actions relating to expenditures which were not of public money from the state treasury." *Id.* The court then concluded that, respecting the attorney general, the statute was only "directory" and "permissive" and that, consequently, there had been no defect in the trial court's jurisdiction. *Id.* at 368, 156 N.E. at 190. Consequently, the earlier judgment was allowed to stand, the city solicitor's dereliction notwithstanding.

The *Lynch* decision was not inconsistent with the attorney general's possession of broad inherent authority. Because the court viewed the underlying dispute between the school board and Lynch as a matter of predominantly municipal significance, the court's construction of the statute did not result in a narrower view of attorney general authority than existed at common law. The supreme court reasoned that, since only local funds were involved, the attorney general's active participation in the litigation was not a jurisdictional requisite. *Id.* at 369-70, 156 N.E. at 190. Furthermore, the court's decision was obviously impelled in large measure by the salutary value of repose, since the supreme court accentuated the fact that "the judgment was voluntarily paid by the board of education months before the Attorney General knew of the same and before the Attorney General filed any proceedings to vacate the judgment." *Id.* at 371, 156 N.E. at 191.

⁷⁷ In *State ex rel. Kohler v. Anderson*, 45 Ohio St. 196, 12 N.E. 656 (1887), an original action in quo warranto in the supreme court, the attorney general had filed the action on his own relation for the ouster from office of the city council president of Urbana, Ohio. The defendant demurred, arguing that the statutes governing quo warranto actions did not confer upon the attorney general the right to institute such an action on his own initiative against a public officer, and it was arguable that the statutes did not in fact decisively authorize the action. See OHIO REV. STATUTES §§ 6762, 6763 (Smith and Benedict 1893). Nevertheless, the supreme court perfunctorily discounted the defendant's objection. Disdaining the linguistic

arguably reflect an expansive judicial perception of attorney general authority.⁷⁸ Such statutory construction cases, of course, do not bear directly upon the existence of inherent common law powers in the hands of Ohio's attorney general. But, when synthesized, these cases furnish support for the view that the attorney general is something more than an officer who merely derives his stature and functions from the General Assembly.

The most notable nineteenth century case concerning the authority of the attorney general in Ohio is *State ex rel. Little v. Dayton & Southeastern Railroad*.⁷⁹ The supreme court there upheld an exercise of power by the attorney general on grounds that were nominally statutory. The attorney general had brought suit for injunctive relief against the railroad, alleging that the latter "was obstructing a public county road."⁸⁰ The court found that the defendant's operations constituted a public nuisance. It then proceeded to determine that, pursuant to statute, "the attorney general was fully authorized to maintain the action."⁸¹ Though this result may seem rather unremarkable, the decision is noteworthy in several respects. First, the court's reasoning was based exclusively on common law precedent. As the court noted: "[T]hat the attorney general was to institute such suits in behalf of the public is abundantly shown by the authorities." It supported this statement by citing common-law authorities, including English case law.⁸² Next, the court observed that a common-law attorney general could bring such an action on his own relation and,

escapades that usually accompany statutory construction, the court simply stated that it was "quite obvious" the attorney general could bring the action. The supreme court has spurned other nonfrivolous challenges to attorney general authority with similar dispatch. See *State ex rel. Duffy v. Ferguson*, 132 Ohio St. 524, 9 N.E.2d 290 (1937); *State ex rel. Walton v. Crabbe*, 109 Ohio St. 2d 623, 143 N.E. 189 (1924); *State v. Newton*, 26 Ohio St. 200 (1876). See also *State ex rel. Wasson v. Taylor*, 50 Ohio St. 120, 38 N.E.2d (1893); *Thompson v. Watson*, 48 Ohio St. 552, 31 N.E. 742 (1891).

⁷⁸ For example, in *State ex rel. Crabbe v. Plumb*, 116 Ohio St. 428, 156 N.E. 457 (1927), the supreme court declared without reference to any legislation "that the Attorney General, being the chief law officer of the state and all the departments thereof, has authority to institute an action in mandamus against a public officer to require him to discharge a duty placed upon him by a mandatory statute . . ." *Id.* at 429, 156 N.E. at 458. Another court issued a dictum that "[a]ny state official ordinarily may call upon the Attorney General to represent him and the Attorney General will so do, when in the exercise of his discretion he determines that right and justice are with the official." *Dickinson v. Hot Mixed Bituminous Indus.*, 58 N.E.2d 78, 86 (Ohio Ct. App. 1943). In *State ex rel. S. Monroe & Son Co. v. Baker*, 112 Ohio St. 356, 364, 147 N.E. 501, 504 (1925), Chief Justice Marshall, writing for the court, declared that "all . . . executive officers of the state government . . . have powers and authority which have been conferred by the Constitution and by the Legislature, and each is independent of the other." *Id.* at 371, 147 N.E. at 505-06.

⁷⁹ 36 Ohio St. 434 (1881).

⁸⁰ *Id.* at 435.

⁸¹ *Id.* at 440.

⁸² *Id.*

without more, stated that Ohio's attorney general could thus do the same.⁸³ Therefore, though purporting to engage in application of a statute, the court looked solely to the common law for direction and made not even the slightest mention of such niceties as exploration of legislative intent or principles of statutory construction. Finally, the court held that the attorney general's right of action in this area remained unimpaired by the General Assembly's enactment of a provision authorizing county commissioners to seek damage awards from entities obstructing county roads. The court "regard[ed] the act as merely cumulative, and not as in anyway affecting the right of the State to maintain the present action,"⁸⁴ thus indicating that, at the least, the attorney general's power had not been impliedly abrogated by the legislature.⁸⁵

An Ohio trial court subsequently found no merit in a defendant's protestations that the attorney general could not maintain an action to prevent the occurrence of a public nuisance. In *State ex rel. Sheets v. Hobart*,⁸⁶ the attorney general had petitioned the court to enjoin an impending prize fight. The court first concluded that the staging of the event would be detrimental to the moral character of the citizenry and, as such, prophylactic action was a matter of interest to the state.⁸⁷ Having done so, the court had little difficulty in then determining that the attorney general possessed standing to seek judicial preclusion of the upcoming contest. Prefatory to a discussion of numerous decisions rendered by the courts of England and other American jurisdictions, the court declared that "the court is not driven to the necessity of making a precedent, as will hereafter appear. That the state through its attorney general can maintain an action in equity to enjoin a public nuisance is well settled."⁸⁸ Concededly, the court did thereafter quote from an Ohio statute as reflective of the attorney general's standing, but this statutory reference ap-

⁸³ When the suit did not immediately concern the rights of the crown or government, its officers depended on the relation of some person, whose name was inserted in the information as the relator. A relator, however, in such cases was by no means indispensable; and the attorney general might, if he chose, proceed in the suit without one.

Id. Therefore, ruled the court, "it was competent for the attorney-general to institute the suit without a relator." *Id.*

⁸⁴ *Id.* at 442.

⁸⁵ *But cf.* *State ex rel. Brown v. Rockside Reclamation, Inc.*, 47 Ohio St. 2d 76, 351 N.E.2d 448 (1976) (power of attorney general to contest operation of landfill under general nuisance statute abrogated by enactment of special solid waste disposal statute). See notes 107-17 *infra* and accompanying text.

⁸⁶ 8 Ohio N.P. 246 (C.P. Hamilton Cty. 1901).

⁸⁷ *Id.* at 264-66.

⁸⁸ *Id.* at 270.

pears to have been proffered merely to bolster the foregoing conclusion that the action was properly brought by the attorney general.⁸⁹

It is inferable from the various decisions discussed heretofore that Ohio courts recognized—but did not perceive a necessity to unequivocally explicate—that the attorney general created by the constitution of 1851 is not an official intended to procure his authority only through the beneficence of the legislature. Indeed, as early as 1876, the Supreme Court of Ohio, discussing the 1852 attorney general legislation, had rather obliquely acknowledged the importance of the elevation of the office to constitutional heights:

The office of attorney general was first created in 1846 . . . The office of attorney general, by the present constitution, is made a constitutional office; and the present act in relation to it, which was passed since the adoption of the constitution, merely prescribes the duties of the office.⁹⁰

The significance of the attorney general's constitutional genesis and the vital distinction between the Attorney General and purely statutory public officers were to be more carefully explained by the supreme court nearly half a century later. In *State ex rel. Doerfler v. Price*⁹¹ a county prosecutor had brought an action in quo warranto against the attorney general, seeking a determination that the attorney general could not within the bounds of Ohio's constitution order the impanelment of a special grand jury by a court of common pleas. Specifically, it was the plaintiff's assertion that the attorney general, by commanding that a special grand jury be seated, had usurped a prerogative of county government—of the county prosecutor in particular—and that such a tactic was an encroachment upon governmental power constitutionally reserved for exercise by local officials. Since the General Assembly had explicitly empowered the attorney general to take such action,⁹² the dispute did not require that the court squarely confront the question whether specific common-law powers inhere in the office of attorney general, and the court did not directly

⁸⁹ The court did not state that the statute was applicable. Indeed, the provision quoted was plainly not dispositive of the controversy before the court. The statute simply authorized the attorney general's appearance in court on behalf of the state "[w]hen required by the governor or general assembly." *Id.* at 271 (quoting OHIO REV. STATUTES § 202 (Smith and Benedict 1893)). The Attorney General had instituted the suit on his own initiative. In another piece of litigation an Ohio trial court declared that, "[i]t having been determined that the state is the party beneficially interested in this suit, the Attorney General, in the opinion of the court, was a proper officer to prosecute the action in the name of the state." *State ex rel. Monnett v. Board of County Comm'rs*, 4 Ohio N.P. 177, 180 (C.P. Preble Cty. 1899).

⁹⁰ *State v. Newton*, 26 Ohio St. 200, 205 (1876).

⁹¹ 101 Ohio St. 50, 128 N.E. 173 (1920).

⁹² *See id.* at 52, 128 N.E. at 173-74.

address that issue. The decision is nonetheless most enlightening because of the language and reasoning employed by the court in upholding the constitutionality of the pertinent statute.

The court began its analysis of the problem before it by acknowledging the constitutional status of the office of attorney general and declaring that the attorney general draws authority from both legislative enactments and the constitution itself:

[I]t will be helpful to see what the state constitution says about the attorney general [T]he attorney general of Ohio is a constitutional officer of the state, in the executive department thereof, *chargeable with such duties as usually pertain to an attorney general*, and especially with those delegated to him by the general assembly of Ohio, exactly as duties are delegated to the other executive officers of the state⁹³

The court thus recognized that the sparse language of article III, § 1 was augmented by the traditional common law notions associated with the term "attorney general."

The court further accentuated the importance of the attorney general's constitutional genesis by noting that, in contrast, the county prosecutor is a creature of legislative origin who "exists only by virtue of the favor of the general assembly."⁹⁴ Succinctly elucidating the crucial difference between the attorney general and county prosecutors the court said:

[T]he prosecuting attorney of a county . . . is not a constitutional officer The general assembly of Ohio that passed the act providing for the prosecuting attorney for each county may tomorrow abolish the office and create a new one, or entirely change the duties of the office.⁹⁵

The precise holding of the court was that the constitution does not proscribe the impanelment of a special grand jury by order of the attorney general in accordance with statutory conferral of the power to do so. Despite the narrow gauge of the holding, however, *Doerfler* strongly supports the proposition that some quantum of attorney general authority emanates ipso facto from the recognition of that office in the constitution.

⁹³ *Id.* at 57, 128 N.E. at 175 (emphasis added) (citing OHIO CONST. art. III, § 51).

⁹⁴ *Id.* at 57, 128 N.E. at 175.

⁹⁵ *Id.* The court also observed that counties are "subordinate to the state in the exercise of governmental power, and especially in the exercise of the police power." *Id.* See generally *State ex rel. Arey v. Sherrill*, 142 Ohio St. 574, 53 N.E.2d 501 (1944).

B. *Recent Cases Acknowledging the Attorney General's Inherent Authority to Safeguard the Public Interest*

During the past decade or so, attorney general activity has increased tremendously, due both to the expansion of the office's statutory authority⁹⁶ and to a more frequent invocation of inherent common law power for the protection of the public interest. Generally this extrastatutory authority has not been challenged and Ohio courts have silently acquiesced in its exercise. However, in two recent Ohio cases the issue whether the attorney general possesses inherent common law powers was expressly joined.

In the first case, *State ex rel. Brown v. BASF Wyandotte Corp.*,⁹⁷ the attorney general initiated an action to compel several industrial firms to cease their alleged pollution of Lake Erie. The defendants contested the propriety of the action on the ground that the attorney general was without statutory authority to bring the suit. Conceding the absence of explicit legislative delegation of power to file the action, the plaintiff asserted that his right to represent the interests of Ohio's citizenry stemmed from the historical status of the attorney general as protector of the public interest. The trial court agreed with the plaintiff, holding in an unpublished opinion that the authority of the attorney general to abate a nuisance is "fundamental and inherent in the office."⁹⁸

In the second case, *State ex rel. Brown v. Newport Concrete Co.*,⁹⁹ the attorney general alleged that the defendant had created a public nuisance by constructing a concrete causeway on the Little Miami River that hampered the utility of that estuary to the public. The court of appeals affirmed a summary judgment for the plaintiff, rejecting the defendant's argument that the attorney general lacked the power to initiate and maintain the action:

[W]e need merely to state that the Attorney General of Ohio is the constitutional legal officer for the state, and the officer generally relied upon to institute any necessary legal action to protect the property rights of the state, and the rights of its citizens pertaining to the use and enjoyment of such property . . .

It is quite natural, pursuant to the general constitutional and

⁹⁶ See, e.g., OHIO REV. CODE ANN. § 109.51 (Page 1969); § 109.71 (Page Supp. 1975); § 3745.08 (Page Supp. 1975).

⁹⁷ No. 904,571 (Ohio C.P. Cuyahoga Cty. Feb. 22, 1974). The case had first been commenced in the United States Supreme Court in 1970, but that Court declined to exercise its original jurisdiction. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971).

⁹⁸ Memorandum of Opinion at 17, *State ex rel. Brown v. BASF Wyandotte Corp.*, No. 904,571 (Ohio C.P. Cuyahoga Cty. Feb. 22, 1974).

⁹⁹ 44 Ohio App. 2d 121, 336 N.E.2d 453 (1975).

statutory powers of the Attorney General of the state that his office is the one which should exercise the rights of the state of Ohio as they relate to the natural resources of the state, and the rights of the citizens of this state to the continued free use of such resources as are held in trust by our state.¹⁰⁰

The court added that statutes prescribing certain actions by the attorney general in the environmental protection area merely represent "legislative recognition" of that officer's essential role, inherent in his constitutional station, as guardian of the public interest.¹⁰¹

The Supreme Court of Ohio has not yet expressly ruled that the attorney general is constitutionally entitled to wield the full assortment of powers developed by his common-law predecessor. However, the seeds of such a holding may have been sown in that court's opinion in *State v. City of Bowling Green*.¹⁰² The state, through the attorney general, had brought suit against the city of Bowling Green, contending that the city's negligent operation of its sewage treatment facility resulted in the destruction of Portage River fish. The right of the attorney general to prosecute the action was not challenged directly, the defendant instead contesting the standing of the state. The court found that the state holds wildlife in trust for the benefit of its citizens and held the action to be properly instituted, saying:

We conclude that where the state is deemed to be the trustee of property for the benefit of the public it has the obligation to bring suit . . . to protect the corpus of the trust property

. . . The state's right to recover exists simply by virtue of the public trust property interest which is protected by traditional common law¹⁰³

The supreme court thus quite lucidly affirmed the right and duty of the state to protect the collective interests of its people and implicitly recognized that the attorney general is the virtual embodiment of the state for this purpose.

The same court's decision in *Brown v. Buyer Corp.*¹⁰⁴ also deserves mention. The defendant in that charitable trust enforcement case challenged the statutory authority of the Attorney General to maintain the action. The supreme court held that the conduct of the plaintiff attorney general was statutorily warranted,¹⁰⁵ but noted

¹⁰⁰ *Id.* at 128-29, 336 N.E. 2d at 458.

¹⁰¹ *Id.* at 129, 336 N.E.2d at 458. The court referred to Ohio Revised Code chapter 3745 as exemplary. *Id.* See OHIO REV. CODE ANN. § 3745.08 (Page Supp. 1975).

¹⁰² 38 Ohio St. 2d 281, 313 N.E.2d 409 (1974).

¹⁰³ *Id.* at 283, 313 N.E.2d at 411.

¹⁰⁴ 35 Ohio St. 2d 191, 299 N.E.2d 279 (1973).

¹⁰⁵ *Id.* at 196, 299 N.E.2d at 282.

that, had the issue of statutory application been decided otherwise, it would turn to the common-law powers of the attorney general for ultimate resolution of the dispute concerning that officer's role in the litigation.¹⁰⁶

Much of the foregoing discussion may seem to be of questionable validity in light of the most recent reported decision involving the assertion of attorney general authority, *State ex rel. Brown v. Rockside Reclamation, Inc.*¹⁰⁷ In *Rockside*, the attorney general, acting on his own initiative, contested the allegedly unlawful operation of a landfill facility. Rockside challenged the power of the attorney general to prosecute the action absent a request by the Director of the Ohio Environmental Protection Agency that suit be brought. The Supreme Court of Ohio sustained the defendant's contention and held that the litigation could not be maintained by the attorney general under the circumstances. A casual reading of the supreme court's *Rockside* opinion might indicate that an ample portion of the attorney general's inherent power has been legislatively retracted, but this impression is dispelled by a more careful analysis of the court's decision.

Ohio's general nuisance statutes¹⁰⁸ comprised the purported basis for the attorney general's action in *Rockside*. The defendant argued¹⁰⁹ that these general nuisance statutes had been partially superseded by the enactment of more recent legislation governing the operation of solid waste disposal facilities such as Rockside's landfill.¹¹⁰ The supreme court, adhering to the "well-established principle of statutory construction that a subsequently enacted, specific statute takes precedence over earlier general legislation,"¹¹¹ decreed that landfill operations had been exempted from the purview of the general nuisance statutes.¹¹² Therefore, ruled the court, the attorney general had failed to allege the creation of a nuisance by the defendant.¹¹³ There is no suggestion in the *Rockside* opinion that the attorney general would

¹⁰⁶ Because the statute was held to authorize the action, the court found it "unnecessary to determine the extent of the common law powers of the Attorney General in dealing with charitable trusts." *Id.*

¹⁰⁷ 47 Ohio St. 2d 76, 351 N.E.2d 448 (1976).

¹⁰⁸ See OHIO REV. CODE ANN. § 3767.13, 3767.32 (Page 1971).

¹⁰⁹ See Brief of Defendant-Appellee at 11-18, *State ex rel. Brown v. Rockside Reclamation, Inc.*, 47 Ohio St. 2d 76, 351 N.E.2d 448 (1976).

¹¹⁰ See OHIO REV. CODE ANN. § 3734-.01-.99 (Page 1971 & Supp. 1975).

¹¹¹ 47 Ohio St. 2d at 83, 351 N.E.2d at 453.

¹¹² *Id.* at 78-83, 351 N.E.2d at 450-53.

¹¹³ The court stressed that Rockside was licensed to operate the landfill pursuant to OHIO REV. CODE ANN. § 3734.05 (Page Supp. 1975), and ruled that the general nuisance statutes are "not applicable to a solid waste disposal operation licensed under R.C. Chapter 3734." 47 Ohio St.2d at 83, 351 N.E.2d at 453.

be unable to contest the defendant's conduct were the solid waste disposal legislation not operative to foreclose a cognizable nuisance claim.¹¹⁴

Under the solid waste disposal statute, "The Attorney General . . . upon complaint of . . . the Director of Environmental Protection, shall prosecute to termination or bring an action for injunction" against violators.¹¹⁵ The *Rockside* court interpreted this provision to proscribe the initiation of legal action by the attorney general unless he is so directed.¹¹⁶ The fact that the supreme court embraced such a constricted view of attorney general authority in this instance could be perceived as an announcement that statutes commanding certain attorney general action carry implicit prohibitions of extrastatutory activity. Such a conclusion, however, would seem to be unwarranted. The probable reason that the *Rockside* court narrowly construed the statute in question was because that provision is but one facet of a tightly-drawn statutory scheme, implementation of which is consigned to the province of administrative judgment and expertise. Indeed, the supreme court emphasized that the *Rockside* litigation had deviated from the mandatory pathways of administrative procedure.¹¹⁷ Seen in this context, *Rockside* represents a declaration of exclusive primary jurisdiction rather than a comprehensive statement regarding the authority of Ohio's attorney general.

In summary, although the character of attorney general power has never been directly examined by the Supreme Court of Ohio, that court has periodically intimated that there is a reservoir of powers

¹¹⁴ The analysis employed by the supreme court was purely statutory in nature. See *id.* at 78-83, 351 N.E.2d at 450-53. Nor did the parties present any discussion of the attorney general's inherent power. See Brief of Plaintiff-Appellant at 28-45, Brief of Defendant-Appellee at 11-33, *State ex rel. Brown v. Rockside Reclamation, Inc.*, 47 Ohio St. 2d 76, 351 N.E.2d 448 (1976). The decision of the court of appeals from which the plaintiff appealed to the supreme court was also narrowly grounded on legislative preemption with respect to solid waste disposal facilities. See *State ex rel. Brown v. Rockside Reclamation, Inc.*, 48 Ohio App. 2d 157, 166-83, 356 N.E.2d 733, 739-47 (1975), *aff'd*, 47 Ohio St. 2d 76, 351 N.E.2d 448 (1976).

¹¹⁵ OHIO REV. CODE ANN. § 3734.10 (Page Supp. 1975).

¹¹⁶ 47 Ohio St. 2d at 81, 351 N.E.2d at 451-52.

¹¹⁷ *Rockside* forcefully urged that the issues sought to be litigated by the attorney general had been committed by the General Assembly to the process of administrative determination. Therefore, postulated the defendant, the action of the attorney general was in circumvention of prescribed administrative procedure, and the failure to pursue administrative relief precluded adjudication of the dispute in Ohio's courts. See Brief of Defendant-Appellee at 33-50, *State ex rel. Brown v. Rockside Reclamation, Inc.*, 47 Ohio St. 76, 351 N.E.2d 448 (1976). This approach obviously proved to be persuasive, for the supreme court stated:

[T]he specific matter which the Attorney General now wishes to place immediately and directly before this court has not been processed in accordance with the specific requirements of both the Solid Waste Disposal Act (R.C. Chapter 3743) and the Environmental Protection Agency Act (R. C. Chapter 3745).

47 Ohio St. 2d at 84, 351 N.E.2d at 453-54.

and duties that inhere in the attorney general by virtue of his constitutional status. In the past several years, the attorney general has ventured outside the scope of functions expressly recognized by statute, and the question whether the attorney general possesses inherent common law attributes has been brought to the fore in litigation. Ohio courts have generally responded to this question by holding that the attorney general of Ohio is constitutionally conferred the independent authority of the common-law attorney general concept.

IV. THE ATTORNEY GENERAL AND THE GENERAL ASSEMBLY

A. *The Extent to Which the General Assembly May Regulate the Functions of the Attorney General*

Adherence to the view that the Ohio attorney general is constitutionally vested with inherent common law authority does not mean that the attorney general is entirely beyond the pale of legislative regulation.¹¹⁸ It has always been supposed that the General Assembly can exert some measure of control over Ohio's executive officials. Conversely, it has also been recognized that, with respect to constitutional executive officers, there are bounds beyond which legislative circumscription of powers and duties will not be permitted. On one occasion the supreme court characterized the residuum of gubernatorial authority that is constitutionally immune from legislative impingement as the "irreducible minimum."¹¹⁹ Because Ohio courts have not spoken on the subject, the task of attempting to divine the irreducible minimum of attorney general authority that is constitutionally secured from legislative restrictions is fraught with the usual pitfalls of speculative endeavor. However, some unavoidably imprecise conclusions can be drawn from a brief glance at Ohio decisional law concerning constitutional power reposed in other state officials.

It is settled beyond question that enactments of the General Assembly may not contravene the provisions of the constitution. This fundamental maxim applies to constitutional delegations of authority, both express and implied. As the supreme court has tersely but

¹¹⁸ With the exception of Illinois, *see Fergus v. Russel*, 270 Ill. 304, 110 N.E. 130 (1915), there is unanimity among American jurisdictions that constitutional adoption of the common-law attorney general concept does not preclude legislative regulation of state attorney general powers and duties. *See, e.g., State Bd. of Pharmacy v. Hallet*, 88 Colo. 331, 296 P. 540 (1931); *Darling Apartment Co. v. Springer*, 25 Del. Ch. 420, 22 A.2d 397 (1941); *People v. Karalla*, 35 Mich. App. 541, 192 N.W.2d 676 (1971); *State ex rel. Meyer v. Peters*, 188 Neb. 817, 199 N.W.2d 738 (1972); *Van Riper v. Jenkins*, 140 N.J. Eq. 99, 45 A.2d 844 (1946).

¹¹⁹ *State ex rel. S. Monroe & Son v. Baker*, 112 Ohio St. 356, 368, 147 N.E. 501, 505 (1925).

cogently remarked, "[a] power which the legislature does not give, it cannot take away."¹²⁰ It is thus tautological that the attorney general's irreducible minimum is comprised of whatever powers and duties are assigned his office by the constitution of 1851.

It is ordinarily true that no one possesses a vested right or interest in continued adherence to the rules of the common law, because common-law principles are usually subject to modification or abrogation by the General Assembly.¹²¹ To this generalization must be annexed the caveat that the legislature may not disturb a rule of the common law that is expressly embraced by the constitution.¹²² And when there appears in the constitution of Ohio a grant of explicitly described authority to a particular official or agency, the General Assembly is without the ability to attach restrictive conditions to the exercise of that authority.

In adopting the common-law designation "attorney general," however, the framers of Ohio's constitution embodied in that document neither a fixed rule of law nor a precise delegation of powers and duties. Rather, the framers incorporated a common-law concept. As with other constitutionally recognized historical institutions such as courts and juries, the essential character of this concept was well known, but its every facet could not and did not need to be meticulously described. The common-law attorney general concept is readily adaptable to emergent needs for governmental legal representation. Indeed, the growth of the office at common law was sparked by its flexibility and the versatility of its holders. Moreover, measured growth is the most attractive feature of the common law: Ohio jurists have, in extolling the salutary aspects of the common-law tradition, invariably accorded prime importance to the capacity of the common law for adaptation in the face of changing circumstances.¹²³ Thus the attorney general concept adopted by the constitutional framers was comprised of a basic governmental role and its desirably fluid incidents, rather than a static collection of detailed traits.

Similarly, article IV of the constitution does not explicitly ascribe certain characteristics to the courts. The designation "judicial court," like that of "attorney general," denotes a status or role the implications of which are not to be found in the unambiguous lan-

¹²⁰ *Hale v. State*, 55 Ohio St. 210, 215, 45 N.E. 199, 200 (1896).

¹²¹ *Leis v. Cleveland Ry.*, 101 Ohio St. 162, 128 N.E. 73 (1920). *See also* *Miller v. Fairley*, 141 Ohio St. 327, 48 N.E.2d 217 (1943); *George D. Harter Bank v. McKinley Lumber Co.*, 136 Ohio St. 465, 26 N.E.2d 587 (1940).

¹²² *See Fassig v. State*, 95 Ohio St. 232, 248, 116 N.E. 104, 108 (1917).

¹²³ *See, e.g., Fowler v. City of Cleveland*, 100 Ohio St. 158, 169, 126 N.E. 72, 76 (1919); *Chilcote v. Hoffman*, 97 Ohio St. 98, 101, 119 N.E. 364, 364 (1917); *Flandermeyer v. Cooper*, 85 Ohio St. 327, 337, 98 N.E. 102, 104 (1912).

guage of any single document. The irreducible minimum of an Ohio court is comprised of those elements which constitute it a court in the traditional Anglo-American sense—the inherent powers and duties without which it would not comport with “every conception of a court.”¹²⁴ While the General Assembly is free to regulate the implementation of the constitutional courts’ inherent powers, that body may not destroy such powers,¹²⁵ because to do so would render nugatory the constitution’s bestowal on those tribunals of the status of judicial courts.

And so it is also with the attorney general of Ohio. The conclusion is virtually irresistible that the attorney general as established in Ohio’s constitution is an officer whose description, in its particulars, was not meant to be irrevocably tethered to any single point in history or set of circumstances. Instead, the essential character of that office—its irreducible minimum—consists of whatever basic powers and duties are indispensable to the status of attorney generalship. In other words, the attorney general of Ohio is constitutionally assigned the role of chief law officer of the state with primary responsibility, and commensurate authority, for furnishing legal advice to the government and serving as litigation representative for the state and its citizens.

In most other jurisdictions courts have indicated that the common-law powers of state attorneys general may be altered or withdrawn by legislative mandate.¹²⁶ Although not articulated by these courts, the rationale underlying such intimations must be that the fluidity of the common-law attorney general concept was not meant to be eviscerated by the constitutional recognition of the office. This rationale is generally sound, but its logic should not apply in all cases. Recognition and retention of the dynamic nature of the office of attorney general is justifiable only within limits. Very specific types of traditionally approved attorney general action need not be considered inviolable merely because the common-law attorney general

¹²⁴ *Hale v. State*, 55 Ohio St. 210, 212, 45 N.E. 199, 200 (1896). See note 62 *supra*.

¹²⁵ See *Cincinnati Polyclinic v. Balch*, 92 Ohio St. 101, 111 N.E. 159 (1915). The supreme court has consistently decreed that the General Assembly may not forestall or impede the exercise of inherent judicial powers. See, e.g., *In re Nevius*, 174 Ohio St. 560, 191 N.E.2d 166 (1963); *State v. United Steelworkers Local 5760*, 172 Ohio St. 75, 173 N.E.2d 331 (1961); *State ex rel. Turner v. Albin*, 118 Ohio St. 527, 161 N.E. 792 (1928); *In re Thatcher*, 80 Ohio St. 492, 89 N.E. 39 (1909); *Hale v. State*, 55 Ohio St. 210, 45 N.E. 199 (1896).

¹²⁶ See, e.g., *State ex rel. Carmichael v. Jones*, 252 Ala. 479, 484, 41 So. 2d 280, 284 (1949); *Pierce v. Superior Court*, 1 Cal. 2d 759, 761-62, 37 P.2d 460, 461 (1934); *State ex rel. Landis v. Kress*, 115 Fla. 189, 200, 155 So. 823, 827 (1934); *State ex rel. Olsen v. Public Serv. Comm’n*, 129 Mont. 106, 114, 283 P.2d 594, 598 (1955); *State ex rel. Maloney v. Wells*, 79 S.D. 389, 399, 112 N.W.2d 601, 605 (1961). The sole exception is Illinois. See *Fergus v. Russel*, 270 Ill. 304, 110 N.E. 130 (1915).

concept is elevated to a constitutional plane; on the other hand, as was prudently observed in the Kentucky case of *Johnson v. Commonwealth ex rel. Meredith*,¹²⁷ acknowledgement of some legislative leeway respecting the functions of the office must not serve as a warrant for statutory emasculation of a state attorney general constitutionally cast in the mold of the common-law attorney general concept.

In summary, it is submitted that there is indeed an irreducible minimum of authority inherent in the office of attorney general of Ohio by virtue of article III, § 1. This core of authority is defined by the traditional role of the attorney general as the lawyer of the government and the legal guardian of the public interests and by the incidents necessary for the fulfillment of that role. The General Assembly may provide instruction for the attorney general or temper his functions, but it may not deprive him of the authority inherent in the traditional, constitutionally adopted status of the Attorney General as principal law officer. Any less nebulous description of the irreducible minimum of attorney general authority must come from the judiciary through case-by-case determination.

B. Conformity to the Common-Law Attorney General Concept in Current Ohio Statutes Pertaining to the Functions of the Attorney General

A review of extant Ohio statutes indicates that the General Assembly has not attempted to appreciably impede the exercise of traditional attorney general authority. The legislature instead appears to have recognized the constitutional character of the attorney general: it has accentuated certain of his specific common-law traits by express statutory provisions, wrought several subtle and relatively innocuous inroads on his freedom of action, and assigned him specific new functions in keeping with his constitutionally created role in state government.

1. The Traditional Role as "Chief Law Officer"

The General Assembly appears to have recognized that Ohio's

¹²⁷ 291 Ky. 809, 165 S.W.2d 820 (1942). The court recognized that the state legislature might regulate the common-law powers of the Kentucky attorney general, but added:

[T]he office may not be stripped of all duties and rights so as to leave it an empty shell, for obviously, as the legislature cannot abolish the office directly, it cannot do so indirectly by depriving the incumbent of all his substantial prerogatives or by practically preventing him from discharging the substantial things appertaining to the office.

Id. at 844, 165 S.W.2d at 829. The Supreme Court of Ohio has employed like reasoning with regard to the constitutional role of the Governor. See *State ex rel. Brown v. Ferguson*, 32 Ohio St. 2d 245, 291 N.E.2d 434 (1972).

attorney general was cast in the mold of the common-law attorney general concept. Indeed, were such an effort not rendered inconsequential by article III of Ohio's constitution, it could be credibly contended that the attorney general is statutorily clothed with all the traditional incidents of attorney generalship. The fundamental legislative exposition of the attorney general's duties, Ohio Revised Code § 109.02, simply declares in relevant part:

The attorney general is the chief law officer for the state and all its departments No state officer, board, or the head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys at law. The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested. When required by the governor or general assembly, he shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor, he shall prosecute any person indicted for crime.¹²⁸

This provision is seminal among the relevant legislation, and its language is deserving of extensive consideration.

The use of the label "chief law officer" as a description of the attorney general in § 109.02 is telling. Historically the term "chief law officer" was synonymous with the common-law attorney general. As has been seen, the "chief law officer" notion is the keystone of the common-law attorney general concept: the old title "attorney general" achieved its modern, enduring signification in the seventeenth century solely because the lawyer so denominated became literally the chief law officer of the crown. In contemporary American usage the term "chief law officer" denotes the common-law attorney general concept and courts of other jurisdictions have so gauged the import of that term's employment.¹²⁹ Therefore, the ap-

¹²⁸ OHIO REV. CODE ANN. § 109.02 (Page Supp. 1975).

¹²⁹ Because of the historical identity of the term "chief law officer" and the common-law attorney general concept, the former label has often been used to encapsulize the many powers and duties associated with the traditional status of the attorney general. *See, e.g., State ex rel. Landis v. Kress*, 115 Fla. 189, 200, 155 So. 823, 827 (1934); *State v. Finch*, 128 Kan. 665, 668, 280 P. 910, 913 (1929); *State ex rel. Young v. Robinson*, 101 Minn. 277, 288, 112 N.W. 269, 272 (1907); *In re Equalization of Assessment of Natural Gas Pipelines*, 123 Neb. 259, 261, 242 N.W. 609, 610 (1932). Moreover, the New Mexico rule that the state attorney general is without broad inherent powers, *see* notes 31-35 *supra* and accompanying text, is partially grounded on the circumstance that New Mexico district attorneys are assigned the role of "the law officer of the state," under NEW MEXICO CONST. art. VI, § 24. This factor was a key determinant of the New Mexico Supreme Court's 1967 decision to reaffirm the holding of *State v. Davidson*, 33 N.M. 664, 275 P. 373 (1929). *See State v. Reese*, 78 N.M. 241, 243, 245, 430 P.2d 399, 401, 403 (1967).

pearance of "chief law officer" in § 109.02 can sensibly be viewed as indicative of the General Assembly's awareness that the attorney general of Ohio possesses the attributes of the common-law attorney general.¹³⁰

It is also worthy of comment that the attorney general is recognized in § 109.02 as the chief law officer of both the state as a whole and the multifarious components of state government. It will be recalled that, at common law, the attorney general of England labored on two divergent fronts. He was not only the principal legal representative of the government itself, but also prosecuted violations of the rights of the collective populace. A kindred differentiation of governmental legal work in the United States can be aptly drawn: with respect to the legal business of a modern republican government, one may validly distinguish between work generated by particular governmental agencies charged with discrete areas of responsibility and legal work whose performance is a matter of general governmental and public interest. When cognizance is taken of this distinction, it is exceedingly significant that the General Assembly has accepted that the attorney general is chief law officer of the state—the principal legal representative of the public interest—in addition to his function as house counsel to each of the many separate arms of state government.

Such a reading of § 109.02 is buttressed by the wording of a subsequent statutory provision pertaining to the functions of the attorney general which alludes to "all his common law and statutory powers."¹³¹ This view also receives support from the remaining provisions of § 109.02. These provisions specify that the attorney general must represent the state in litigation, whether civil or criminal, that is perceived by the Governor or General Assembly to be heavily suffused with state interest. Furthermore, by commanding that the attorney general appear in litigation in the supreme court in which the state is indirectly interested, § 109.02 arguably attributes to Ohio's attorney general a quality akin to the "superior standing"

¹³⁰ Indeed, absent the adoption of the common-law attorney general concept in Ohio's constitution, it could be creditably posited that the attorney general is *statutorily* assigned the traditional attributes of the attorney generalship. Given the strength of Ohio's common-law heritage, *see* notes 53-55 *supra* and accompanying text, § 109.02 standing alone would certainly be susceptible to such an interpretation. In Oregon, where the office of attorney general is not embodied in the state constitution, it has been held that the statutorily created attorney general possesses common-law powers. *See Gibson v. Kay*, 68 Ore. 589, 137 P. 864 (1914).

¹³¹ Act of Jan. 9, 1961, 129 Ohio Laws 582 (amending OHIO REV. CODE ANN. § 109.26). This language was recently deleted by amendment of the provision. *See* OHIO REV. CODE ANN. § 109.26 (Page Supp. 1975). However, the amendment also featured a declaration that the powers therein ascribed to the attorney general are "in addition to and not in limitation of his powers held at common law." *Id.* § 109.24 (Page Supp. 1975).

which was bestowed upon his common-law predecessors. It is also notable that the attorney general is therein recognized as the sole legal counsel of the other agents of state government.

2. Specific Statutory Attributes

As was earlier stated, Ohio statutes have, from 1852 on, expressly authorized the attorney general to engage in a variety of activities which, in the aggregate, substantially coincide with the undertakings associated with common-law attorneys general. This characterization of Ohio statutes pertaining to the functions of the attorney general retains a large measure of accuracy today. A number of enactments presently in force expressly impose upon the attorney general the duty to serve as governmental legal advisor.¹³² Current Ohio statutes also contain several unambiguous references to the attorney general's litigative function.¹³³ Additional statutory provisions supply the necessary incidents for the attorney general's execution of his office. He is statutorily empowered to appoint assistant attorneys general,¹³⁴ special counsel,¹³⁵ and supportive personnel.¹³⁶

¹³² As has been seen, § 109.02 unequivocally designates the attorney general the sole legal counsel to the myriad elements of state government. *See* OHIO REV. CODE ANN. § 109.02 (Page Supp. 1975). Additional provisions designate the attorney general as legal advisor to certain specific state agencies. *See, e.g., id.* § 4901.17 (Page 1954) (Public Utilities Commission); § 5149.08 (Page 1970) (Adult Parole Authority); § 5505.23 (Page 1970) (State Highway Retirement Board). Other presently operative Ohio statutes specify that the attorney general must furnish requested legal advice to the General Assembly, *id.* § 109.13 (Page 1969) and to functionaries of the executive branch, *id.* § 109.12. The attorney general is further directed by statute to render assistance in the resolution of disputes concerning the title to certain lands in which the state allegedly holds an interest, *id.* § 109.11 (Page Supp. 1975), and to assess the rights of parties from whom the state might acquire an interest in real property, *id.* § 109.121. Finally, the attorney general is statutorily required, on the request of another state official, to "prepare suitable forms of contracts, obligations, and other like instruments of writing for the use of state officers." *Id.* § 109.15 (Page 1969). The attorney general is also commanded to draft forms for local registration of land titles throughout the state. *See id.* § 5309.97 (Page 1970).

¹³³ Of course, § 109.02 expressly commands attorney general participation in the state's litigation under certain circumstances and establishes that executive officers and agencies may not be officially represented in court by any other counsel. *Cf. Sowers v. Civil Rights Comm'n*, 20 Ohio Misc. 115, 252 N.E.2d 463 (C.P. Trumbull Cty. 1969) (attorney general held legal representative of Commission for all legal matters). In addition, the state may be defended only by the attorney general in the court of claims, OHIO REV. CODE ANN. § 2743.14 (Page Supp. 1975), and it is mandated that the Attorney General represent certain state agents sued personally as a result of their efforts on behalf of the state. *Id.* § 109.122. Present statutes also authorize the attorney general to institute proceedings in quo warranto. *Id.* § 1331.11 (Page 1969). Furthermore, current statutes offer explicit recognition that the attorney general is the appropriate person to safeguard the legal interests of the state and its citizens in ensuring the efficient, lawful maintenance of public charities, *id.* §§ 109.23-.32 (Page Supp. 1975), arresting and redressing unfairness in the marketplace, *id.* § 1345.07 and preventing the capricious decimation or destruction of key environmental resources, *id.*

¹³⁴ *Id.* § 109.03 (Page 1969).

¹³⁵ *Id.* § 109.07.

Moreover, the discharge of his litigation duties is facilitated by the express statutory creation of several procedural prerogatives that are unavailable to other suitors.¹³⁷ Therefore, in summary, the specific legislatively countenanced traits of Ohio's attorney general fully comport with the common-law attorney general concept.

In addition to generally recognizing the Attorney General's status as the state's chief law officer and enacting measures that are substantially declaratory of his common-law powers and duties, the General Assembly has engrafted several additional functions to the office of attorney general. These additional statutorily described functions, though hardly amenable to characterization as inherent to the office of attorney general, are nonetheless consonant with the attorney general's essential role in state government. For example, the General Assembly has made the attorney general a member of several key governmental commissions and boards.¹³⁸ Such grants of membership to the attorney general are logical extensions of his inherent advisory function. The attorney general is thus enabled to better supply timely legal advice germane to the operations of those commissions and boards on which he sits.

The General Assembly has also somewhat broadened the charter of the attorney general with respect to litigation involving matters of great public interest. Of course, the attorney general has always been a proper official to appear in court on behalf of the state and its government. But present statutes further authorize the attorney general to represent parties other than the state in certain lawsuits. The attorney general is, for example, permitted to serve as the lawyer of political subdivisions in "antitrust cases and do all things necessary to properly represent them in any such case under the laws of any state or the federal government."¹³⁹ The attorney general is also empowered to appear on behalf of local governmental units in litigation concerning alleged unlawful disbursement or appropriation of local public funds or property.¹⁴⁰ Although the effective prosecution of these types of litigation is obviously of importance to the general public and therefore an appropriate subject of concern by the state's chief law officer, the attorney general might be unable to directly participate in such cases when acting solely on behalf of the state itself.¹⁴¹ Therefore, the attorney general's ability to fulfill his inherent

¹³⁸ *Id.* § 109.05. *See also id.* § 109.33.

¹³⁷ *Id.* §§ 109.10, 109.17-20.

¹³⁸ *See, e.g., id.* § 129.01 (sinking fund); *id.* § 4503.36 (Page 1973) (Ohio Reciprocity Board).

¹³⁹ *Id.* § 109.81 (Page 1969).

¹⁴⁰ *See id.* § 117.10.

¹⁴¹ *See generally* *Lynch v. Board of Educ.*, 116 Ohio St. 361, 156 N.E. 188 (1927).

duty to safeguard the legal interest of the people has been enhanced in these instances by statutes that allow him to represent political subdivisions.

Finally, the General Assembly has broadened the functions of the attorney general by creating in his office two organizations designed to upgrade the quality of criminal law enforcement throughout the state: the Bureau of Criminal Identification and Investigation¹⁴² and the Ohio Peace Officer Training Council.¹⁴³ The first of the entities is charged with compiling and disseminating all kinds of data relevant to criminal investigations,¹⁴⁴ operating a "criminal analysis laboratory,"¹⁴⁵ maintaining a staff of investigators and kindred personnel¹⁴⁶ and promoting coordination of effort among the law enforcement agencies of the various levels of government.¹⁴⁷ The Bureau of Criminal Identification and Investigation is also sweepingly authorized to "engage in such other activities as will aid law enforcement officers in solving crimes and controlling criminal activity."¹⁴⁸ The purpose of the Ohio Peace Officer Training Council is, as its name implies, to assure the effective training of law enforcement officers throughout the state. To accomplish this goal, the Council may propose rules and regulations establishing minimum requirements for all "peace officer training schools" within Ohio.¹⁴⁹ The attorney general then, "in his discretion, may . . . adopt and promulgate any or all of the rules and regulations recommended by the . . . council."¹⁵⁰ These new functions obviously comport well with the attorney general's essential role as principal guardian of the legal rights of the state and its collective constituents, the citizenry. Indeed, such purely statutory functions should facilitate the attorney general's efficient performance of his essential role in state government. Thus the statutory conferral of such functions on the attorney general is a further indication both that the General Assembly has been aware of that officer's constitutional charter and that it has not endeavored to deprive the attorney general of his inherent powers and duties.

3. The Attorney General and the Prosecuting Attorney

A review of the impact of legislation upon the attorney general

¹⁴² OHIO REV. CODE ANN. § 109.51 (Page 1969).

¹⁴³ *Id.* § 109.71 (Page Supp. 1975).

¹⁴⁴ *Id.* § 109.57.

¹⁴⁵ *Id.* § 109.52 (Page 1969).

¹⁴⁶ *Id.*

¹⁴⁷ *See id.* § 109.54 (Page Supp. 1975); § 109.55 (Page 1969); § 109.62 (Page 1969).

¹⁴⁸ *Id.* § 109.52 (Page 1969).

¹⁴⁹ *See id.* § 109.73 (Page Supp. 1975).

¹⁵⁰ *Id.* § 109.74 (Page 1969).

of Ohio must include a consideration of the statutorily originated office of prosecuting attorney. The office of prosecuting attorney is a venerable one in Ohio, its initial establishment by the General Assembly long predating the constitution of 1851.¹⁵¹ Today, as throughout most of Ohio's history, it is statutorily provided that a prosecuting attorney is to be elected by the voters of each county.¹⁵² The charter conferred upon the prosecuting attorney by the General Assembly is as follows:

The prosecuting attorney may inquire into the commission of crimes within the county and shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party, and such other suits, matters, and controversies as he is required to prosecute within or outside the county, in the probate court, court of common pleas, and court of appeals. In conjunction with the attorney general, such prosecuting attorney shall prosecute cases arising in his county in the supreme court¹⁵³

It is first to be noted that the prosecuting attorney is an official of purely local authority. Indeed, under article X, § 1 of Ohio's constitution a legislatively created prosecuting attorney cannot wield any power in matters not germane to the affairs of his own county.¹⁵⁴ Thus, although authorized to invoke the authority of the state in litigation, a prosecuting attorney may do so only with respect to transgressions that directly affect the citizens by whom he was elected.¹⁵⁵

¹⁵¹ The office was first created soon after Ohio achieved statehood. See Act of April 15, 1803, § 25, 1 Ohio Laws 50. It was reestablished under the new constitution in 1852. See Act of April 30, 1852, 50 Ohio Laws 215.

¹⁵² OHIO REV. CODE ANN. § 309.01 (Page 1953).

¹⁵³ *Id.* § 309.08.

¹⁵⁴ See OHIO CONT. art. X, § 1. See also *State ex rel. Doerfler v. Price*, 101 Ohio St. 50, 128 N.E. 173 (1920).

¹⁵⁵ This rule was clearly laid down by the Supreme Court of Ohio in *State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (1940). There, a prosecuting attorney had instituted proceedings in quo warranto to secure the ouster from office of a state official said to be lacking in the legislatively prescribed prerequisites for appointment to the position that he occupied. The defendant demurred, challenging the right of the prosecuting attorney to press the claim. Although conceding that the prosecuting attorney was entitled by statute to initiate proceedings in quo warranto, defendant Lodwich, represented by the attorney general, contended that the prosecutor's petition was nonetheless fatally deficient because, despite alleging an impropriety redressable by quo warranto, it portrayed no direct nexus between the purported violation and the relator prosecuting attorney's home county. While constrained to assume that the defendant was in fact unlawfully appointed to office, the supreme court sustained Lodwich's demurrer and endorsed the attorney general's position that the prosecuting attorney's "duties are confined to affairs within his own county, and that he is not authorized to challenge or question the rights or powers of state officers in the absence of action or assertion of a right to act within such county." *Id.* at 331, 29 N.E.2d at 960.

It should also be noted that it is not inconsistent with the common-law attorney general concept that a local officer is concurrently empowered to represent the state in the prosecution of litigation whose immediate significance is primarily local.¹⁵⁶ While the attorney general is the *chief* law officer of the state, the various prosecuting attorneys are also law officers who may represent the state in their respective localities. Moreover, the legislative grant to prosecuting attorneys of the authority to redress local civil or criminal affronts to the state is not incompatible with the simultaneous residence in the attorney general of power to contest precisely the same abuses. On the contrary, the conferral of litigative power on local officials does not eviscerate the like power of the attorney general as is demonstrated by both the express overlap of unambiguous statutes¹⁵⁷ and by judicial interpretation of more ambiguously drafted enactments.¹⁵⁸ In other words, rather than relieving the attorney general of his inherent function in state government, the existence of the office of prosecuting attorney merely represents an additional mechanism through which the state's legal interests may be vindicated.¹⁵⁹

It is difficult to assess the interrelationship of the attorney general and the prosecuting attorneys. Since the attorney general possesses statewide authority and is explicitly denominated the state's chief law officer, it might be presumed that the various prosecuting attorneys were intended to labor as mere adjuncts of the attorney general. On the other hand, it seems quite clear that the General Assembly intended the prosecuting attorneys to function without the continuous, direct supervision or interference of the attorney general. The prosecuting attorney is charged with the handling of legal matters in which the state is neither a party nor significantly interested.¹⁶⁰ Moreover, much litigation which the prosecuting attorney might conduct on behalf of the state as a nominal party is of no lasting significance beyond the border of the county in which it arises. It

¹⁵⁶ See generally Comment, *The District Attorney—A Historical Puzzle*, 1952 Wis. L. REV. 125.

¹⁵⁷ See, e.g., OHIO REV. CODE ANN. § 117.10 (Page 1969); § 1331.11 (Page 1962).

¹⁵⁸ See *State ex rel. Little v. Dayton & S.E.R.R.*, 36 Ohio St. 434, 441-42 (1881).

¹⁵⁹ It has long been accepted doctrine in Ohio that modes of legal redress are presumed to be cumulative. See, e.g., *Bennett v. Fleming*, 105 Ohio St. 352, 137 N.E. 900 (1922); *Zanesville v. Fannon*, 53 Ohio St. 605, 42 N.E. 703 (1895); *Darst v. Phillips*, 41 Ohio St. 514 (1885).

¹⁶⁰ In addition to undertaking litigation in the name of the state, the prosecuting attorney must attend to "such other suits, matters, and controversies as he is required to prosecute." OHIO REV. CODE ANN. § 309.08 (Page 1953). The prosecuting attorney performs on a local level many of the nonlitigative tasks that the attorney general discharges for state government. See *id.* § 309.09 (Page Supp. 1975); § 309.11 (Page 1953).

hence seems desirable that the operations of prosecuting attorneys not be subjected to incessant intermeddling by a state official, and it is likely that the General Assembly meant for the prosecuting attorneys to be free of excessive intervention by the attorney general.

Still, the attorney general is the principal law officer of the state, and, as such, he naturally must bear some responsibility for the efficient prosecution of all legal action undertaken on behalf of the state. Ultimately the enforcement of the state's laws and protection of its interests are matters of statewide importance, regardless of the context in which disputes involving these matters arise.¹⁶¹ Therefore, it is not surprising to find that the General Assembly has recognized the need for some interaction between the attorney general and the prosecuting attorney. Each prosecuting attorney is statutorily required to annually apprise the attorney general in detail of his criminal prosecutorial activity¹⁶² and must also "furnish to the attorney general any information he requires in the execution of his office, whenever such information is requested by him."¹⁶³ Additionally, the General Assembly has commanded that, on request, the attorney general must counsel a prosecuting attorney with regard to any suit, whether actual or prospective, involving the state.¹⁶⁴

To briefly recapitulate the significance of the office of prosecuting attorney with respect to the role of the attorney general, it appears: that the prosecuting attorney, though empowered to represent the state in litigation, may act on behalf of the state only insofar as such action is predicated by the need to assure the protection of the law to those by whom he is elected; that with regard to those matters in which the prosecuting attorney can invoke the name and authority of the state, he by no means enjoys a monopoly to the exclusion of the attorney general; and that, as the vindication of the state's legal rights is in the final analysis the concern of the sovereign itself, it is the attorney general—constitutionally established and statutorily recognized as the chief law officer of the state—who must exercise ultimate authority in the prosecution of litigation on behalf of the state. Therefore, it is suggested that the prosecuting attorney is directed by statute to conduct all litigation on behalf of the state that is directly related to the affairs of his particular county, unless it is ordered by higher authority that the prosecution of the matter be instead handled by the attorney general. And such higher authority may be the Gover-

¹⁶¹ See generally *State ex rel. Doerfler v. Price*, 101 Ohio St. 50, 57-60, 128 N.E. 173, 175-76 (1920).

¹⁶² OHIO REV. CODE ANN. § 309.15 (Page 1953).

¹⁶³ *Id.*

¹⁶⁴ *Id.* § 109.14 (Page 1969).

nor,¹⁶⁵ the General Assembly¹⁶⁶ or perhaps the chief law officer himself.¹⁶⁷

VI. CONCLUSION

By the middle of the eighteenth century the title "attorney general," through extended use in England and the American colonies, had come to occupy an accepted signification in the lexicon of the Anglo-American legal system. An official so designated was the chief law officer of the sovereign, possessed of broad powers and corresponding responsibility for effectuating the legal rights of the government and the public. This nomenclature and its accompanying conception were perpetuated by the fledgling United States following the American Revolution. When the framers of Ohio's constitution of 1851 incorporated the office of attorney general in the state's executive department without textually describing the powers and duties of that position, it is submitted they intended that Ohio's attorney general would perform the same essential governmental role as his common-law forebears. Therefore, Ohio's attorney general is constitutionally chartered the principal legal counsel of the state, obliged to pursue whatever course he determines to be necessary for the vindication of the right of the public, and with ultimate accountability only to the sovereign itself—the people. He is the present day personification of the common-law attorney general concept.

The ramifications of the attorney general's constitutional charter are profound. As the state's chief law officer the attorney general need not—and certainly should not—merely await externally originated authorization to commence appropriate action while the public endures unlawful abuses of its interests. Rather, the authority—and the duty—to initiate such action inheres in the constitutional creation of the attorney general's office. Only when the public interest is protected by a comprehensive regulatory scheme can the attorney general be forced to defer the institution of litigation so that the agency charged with administration of the scheme may exercise its exclusive primary justification.¹⁶⁸

That Ohio's attorneys general have begun in recent years to exploit the inherent authority of their office should be greeted with guarded optimism. It is desirable that the chief law officer discharge

¹⁶⁵ *Id.* § 109.02 (Page Supp. 1975).

¹⁶⁶ *Id.*

¹⁶⁷ *Cf. id.* § 4123.92 (Page 1973) (specifying that suits to recover funds due the state workmen's compensation fund are to be brought either by the attorney general or by the local prosecutor under the direction of the attorney general).

¹⁶⁸ See text accompanying notes 115-17 *supra*.

his constitutional role as prosecutor of the public interest more zealously than has traditionally been the case in Ohio. For example, incipient problems in the areas of consumer protection,¹⁶⁹ environmental quality¹⁷⁰ and criminal activity¹⁷¹ can be far more expeditiously addressed, at least in the first instance, through the proper exercise of the attorney general's inherent authority than through the often lengthy process of legislative action. On the other hand, the broad power of the attorney general is subject to capricious or malevolent assertion. Of course, "The suggestion that this power may be abused raises no doubt as to its existence,"¹⁷² but the potential for detrimental action predicated by purely personal or political motives—or simply grounded on poor judgment—is an inevitable concomitant of the attorney general's constitutional charter.¹⁷³ In this respect, the attorney general is no different from the Governor: each officer is constitutionally vested with discretionary authority whose exercise may significantly advance or severely retard the well-being of the state and its people.

¹⁶⁹ Compare Saxbe, *The Role of the Government in Consumer Protection: The Consumer Frauds and Crimes Section of the Office of the Ohio Attorney General*, 29 OHIO ST. L.J. 897 (1968), with Note, *The Role of the Michigan Attorney General in Consumer and Environmental Protection*, 72 MICH. L. REV. 1030, 1040-44 (1974). See Comment, *Commercial Nuisance: A Theory of Consumer Protection*, 33 U. CHI. L. REV. 590 (1966). See also Note, *Consumer Protection By the State Attorneys General: A Time for Renewal*, 49 NOTRE DAME LAW. 410 (1973).

¹⁷⁰ See generally Note, *The Role of the Michigan Attorney General in Consumer and Environmental Protection*, 72 MICH. L. REV. 1030, 1045-46 (1974). The value of inherent attorney general authority in this regard had been demonstrated in Ohio. See notes 97-103 *supra* and accompanying text.

¹⁷¹ The General Assembly has acknowledged that the attorney general is the public officer best equipped to spearhead efforts to arrest "organized criminal activity." See OHIO REV. CODE ANN. § 109.83 (Page Supp. 1975) (permitting investigation and prosecution of "organized criminal activity" by the attorney general "[w]hen directed by the governor or general assembly"). In other jurisdictions, state attorneys general have invoked common-law powers in the area of criminal prosecution. See generally DeLong, *Powers and Duties of the State Attorney-General in Criminal Prosecutions*, 25 J. CRIM. L.C. & P.S. 358 (1934).

¹⁷² *Hale v. State*, 55 Ohio St. 210, 214, 45 N.E. 199, 200 (1896) (referring to the inherent power of the judiciary to punish for contempt).

¹⁷³ Even acting within the ambit of statutory authority, a state attorney general may, through the exercise of legal judgment, substantially influence the workings of state government. See Larson, *The Importance and Value of Attorney General Opinions*, 41 IOWA L. REV. 351 (1956); Toepfer, *Some Legal Aspects of the Duty of the Attorney General to Advise*, 19 U. CIN. L. REV. 201 (1950). See also Abraham and Benedetti, *The State Attorney General: A Friend of the Court?*, 117 U. PA. L. REV. 795 (1969); Comment, *An Attorney General's Standing Before the Supreme Court to Attack the Constitutionality of Legislation*, 26 U. CHI. L. REV. 624 (1959).